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UNITED STATES REPORTS

VOLUME 263

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1923

FROM OCTOBER 1, 1923, TO AND
INCLUDING JANUARY 28, 1924

ERNEST KNAEBEL
REPORTER

GOVERNMENT PRINTING OFFICE
WASHINGTON
1924

The price of this volume is fixed under the Act of July 1, 1922, c. 267, 42 Stat. 816, at $2.50 per copy, delivered. Sold by the Superintendent of Documents, Government Printing Office, Washington, D. C.

ERRATUM.

Volume 262, page 702, line 5, correct "Section 1241" to read "Section 1238."

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

WILLIAM HOWARD TAFT, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.

HARRY M. DAUGHERTY, Attorney General.
JAMES M. BECK, Solicitor General.
WILLIAM R. STANSBURY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see p. iv, *post*.

135407

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.[1]

Order of Allotment of Justices.

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Louis D. Brandeis, Associate Justice.

For the Third Circuit, Pierce Butler, Associate Justice.

For the Fourth Circuit, William H. Taft, Chief Justice.

For the Fifth Circuit, Edward T. Sanford, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, George Sutherland, Associate Justice.

For the Eighth Circuit, Willis Van Devanter, Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

February 19, 1923.

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[1] For next previous allotment, see 260 U. S., p. xiv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1923.

FRESE, ADMINISTRATRIX OF FRESE, *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 27. Argued October 3, 1923.—Decided October 15, 1923.

Where a state statute makes it the duty of a locomotive engineer to stop his train within a certain distance of a crossing of another railroad, and positively to ascertain that the way is clear and that the train can safely resume its course, before proceeding to pass the crossing, the duty is a personal one which cannot be devolved by custom upon the fireman; and the negligence of the engineer in failing to comply with the duty is a defense to an action for his resulting death, brought by his administratrix under the Federal Employers' Liability Act, notwithstanding a possibility that the injury might have been avoided if the fireman had been more vigilant. P. 3.

290 Mo. 501, affirmed.

CERTIORARI to a judgment of the Supreme Court of Missouri which reversed a judgment against the respondent railroad company, in an action by the petitioner for damages, under the Federal Employers' Liability Act.

Mr. John G. Parkinson for petitioner.

Even if the Missouri Supreme Court had the right to decide, in conflict with a decision of the Illinois Appellate

Court, that Frese, the engineer, was guilty of negligence as a matter of law in not having prevented the collision, the real and substantial cause of the collision was the negligence of the fireman, Savage, and, under the provisions of § 3 of the Employers' Liability Act, a recovery cannot be denied to the plaintiff, but only diminished in the proportion that the negligence of Frese bore to the combined negligence of Frese and Savage. *Union Pacific R. R. Co.* v. *Hadley,* 246 U. S. 330.

Mr. M. G. Roberts, with whom *Mr. Bruce Scott, Mr. H. J. Nelson* and *Mr. E. M. Spencer* were on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is an action in Missouri under the Federal Employers' Liability Act for the death of the plaintiff's (petitioner's) intestate, caused by a collision in Illinois between engines of the defendant and the Wabash Railroad Company at a grade crossing. The deceased, Frese, was the engineer in charge of the defendant's engine. A statute of Illinois [Hurd's Rev. Stats., 1916, c. 114, § 75] required that "All trains running on any railroad in this State, when approaching a crossing with another railroad upon the same level, or when approaching a swing or draw bridge, in use as such, shall be brought to a full stop before reaching the same, and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass the bridge or crossing." *Southern Ry. Co.* v. *King,* 217 U. S. 524. Frese brought his train to a stop somewhat over two hundred feet from the crossing, and the Wabash train stopped at about three hundred feet from it. But the view of the

Wabash track from the Burlington was obstructed intermittently until the Wabash track was reached. The two trains did not discover each other, but started on again and collided, killing Frese. The Supreme Court of Missouri held that, as the engine was under the control of the engineer who was killed, the statute of Illinois imposed upon him the imperative duty positively to ascertain that the way was clear before entering upon the crossing; that if he had done so he would not have been killed, and that the plaintiff could not recover. Judgment was ordered for the defendant. 290 Mo. 501.

The plaintiff contends that there was evidence of contributory negligence on the part of the fireman, Savage, and therefore that, even if Frese was negligent, that would not be a bar to this action under the Employers' Liability Act. But the only evidence as to the fireman came from a man who was standing on the ground as the engine passed him. He says that it looked to him that the fireman then was looking through the front window at that time and that he continued in that position up to say fifty or sixty feet from the crossing of the tracks. The fireman was on the left on the side of the other approaching train, the engineer on the right where he could not see so well. But of course the witness could not testify which way the fireman turned his eyes after he saw only his back, and it is a mere speculation to argue that Savage did not do all that he could. Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act, (April 22, 1908, c. 149, § 3; 35 Stat. 65, 66,) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more. See *Great Northern Ry. Co.* v. *Wiles,* 240

U. S. 444, 448. If the engineer could not have recovered for an injury his administratrix can not recover for his death. *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 70. There is no doubt that the statute of Illinois applied to this case.

Judgment affirmed.

BREDE *v.* POWERS, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 45. Argued October 4, 1923.—Decided October 22, 1923.

1. The sections of the Revised Statutes governing the places in which sentences of imprisonment for crime may be executed are *in pari materia* and should be construed together. P. 11.
2. The power of the District Court to sentence to imprisonment in another State, in a penal institution designated by the Attorney General under Rev. Stats., § 5546, is not confined to cases in which the imprisonment is for more than a year or at hard labor (§§ 5541, 5542,) but exists also where the sentence is for imprisonment merely, for a year or less. *Id.*
3. Under § 21 of Title II of the National Prohibition Act, which declares any building, boat, vehicle, place, etc., where intoxicating liquor is manufactured, sold, kept, or bartered in violation of that title, to be a common nuisance, and provides that any person maintaining such nuisance shall be guilty of a misdemeanor and punishable by fine of not more than $1,000, or imprisonment for not more than one year, or both, the imprisonment imposed cannot be at hard labor or in a penitentiary; and, the offense, not being infamous, may be prosecuted by information. P. 12.
4. A law of New Jersey (1917, c. 271,) authorizing the board of chosen freeholders of any county to "cause to be employed" within the county any or all prisoners in any county jail, *construed* as not contemplating the requirement of labor as a punishment. P. 13.

279 Fed. 147, affirmed.

APPEAL from an order of the District Court for the Eastern District of New York discharging a writ of *habeas corpus* which had been sued out by the appellant to try the constitutionality of his sentence and commitment by that court to the Essex County Jail, New Jersey—a place designated by the Attorney General pursuant to Rev. Stats., § 5546. The sentence was based upon a conviction under an information which charged a violation of § 21 of Title II of the National Prohibition Act, 41 Stat. 314.

Mr. Otho S. Bowling, with whom *Mr. Robert H. Elder* was on the briefs, for appellant.

The order appealed from is erroneous for the reason that appellant was convicted of an infamous crime, that is, a crime for punishment of which the court had power to subject him to an infamous punishment, namely, imprisonment at hard labor, and since there was no indictment or presentment by grand jury, but prosecution on a mere information, the judgment of conviction was void and the writ of *habeas corpus* should have been sustained.

1. If the crime was infamous, a trial upon a mere information could not give the court jurisdiction, the judgment was void, and subject to collateral attack by *habeas corpus.*

2. An infamous crime is one that carries an infamous punishment; the test does not depend upon the punishment that ultimately happens to be inflicted, but upon the punishment the court has power to inflict. *Ex parte Wilson,* 114 U. S. 417; *Ex parte Bain,* 121 U. S. 1; *Parkinson* v. *United States,* 121 U. S. 281; *In re Claasen,* 140 U. S. 200.

Imprisonment at hard labor is an infamous punishment. *Ex parte Wilson, supra; Wong Wing* v. *United States,* 163 U. S. 228; *United States* v. *Moreland,* 258 U. S. 433. This is just as true of imprisonment at hard labor in an

institution maintained for punishment of minor offenders, such as a house of correction, workhouse, or bridewell, as it is of similar imprisonment in an institution maintained for more serious offenders, such as a state prison or penitentiary. *United States* v. *Moreland, supra.*

3. Although the court attempted to sentence appellant to imprisonment in a penal institution in the State of New Jersey, it had no power to do so, and that part of the judgment which specifies such place of imprisonment is void. The court did, however, have power to sentence appellant to imprisonment in a penal institution in the State of New York. Under the New York law, which by federal statute is made applicable to the discipline of federal prisoners in such institutions, imprisonment therein is imprisonment at hard labor.

4. It has been held that Rev. Stats., § 5564, "may be treated as a proviso to §§ 5541 and 5542." *In re Karstendick,* 93 U. S. 396, 401. It has been decided further that §§ 5541 and 5542 define the only instances in which a United States court can sentence a prisoner to confinement in a "state jail or penitentiary" within the State, that is, when the statute requires hard labor as part of the punishment or when the imprisonment is for more than a year, and that, therefore, when the sentence is in terms to imprisonment merely, for a year or less, the court has no power to sentence the prisoner "to a suitable jail or penitentiary in a convenient State . . . designated by the Attorney General." *In re Mills,* 135 U. S. 263; *In re Bonner,* 151 U. S. 242.

This is the only statute which permits a prisoner to be sent out of the State (save when imprisonment is to be "one year or more at hard labor" when it may be to a federal prison, 26 Stat. 839); and, except where some statute otherwise provides, the jurisdiction of the United States District Courts is limited to their territory. *Toland* v. *Sprague,* 12 Pet. 300, 328; *Hernden* v. *Ridgway,* 17 How. 423; 14 Ops. Atty. Gen. 522.

Therefore, unless *In re Mills* and *In re Bonner* are to be overruled, it follows that so much of the judgment as pretends to designate an institution in the State of New Jersey as the place of imprisonment is void, as being beyond the power of the court.

To what place did the court have power to sentence appellant? Under Rev. Stats. § 5548, it had the power to sentence him to any "house of correction or house of reformation for juvenile delinquents within the State," providing the state legislature had so authorized (this statute does not apply to juvenile offenders; they are provided for by § 5549), or under §§ 5537–5538, to any other place within the State for which the marshal might make provision, except, of course, that under the decisions in the *Mills* and *Bonner Cases* it would have to be some place other than the "state jail or penitentiary."

5. A sentence to any penal institution in the State of New York is a sentence to hard labor. U. S. Rev. Stats., § 5539; *Ponzi* v. *Fessenden,* 258 U. S. 254; 8 Ops. Atty. Gen. 289, 291; Act February 23, 1887, c. 213, § 1, 24 Stat. 411; New York Prison Law, c. 47, Laws 1909, §§ 157, 158, 171; New York County Law, c. 16, Laws 1909, §§ 96, 93; New York City Charter, c. 466, Laws 1901, §§ 697, 700, 702; *People ex rel. Gainance* v. *Platt,* 148 App. Div. 579; *United States* v. *Pridgeon,* 153 U. S. 48.

6. We conclude, therefore, that since the court had power to sentence appellant to certain penal institutions of the State of New York, all of which require hard labor as part of the discipline which would have been required of appellant not only because of the statutes of the State which expressly so provide, but because of the comity between State and United States, of which Rev. Stats., § 5539, is an expression,—a comity limited only by the prohibition against contracting or hiring the labor of the prisoner, and which requires that the United States should not attempt to interfere in the management of the insti-

tutions of the State,—the court had power to sentence appellant to a term at hard labor, which is an infamous punishment, which may not be inflicted except after indictment or presentment by grand jury.

7. A sentence to imprisonment in the County Jail of Essex County, would be a sentence to hard labor. Chapter 271 of the Laws of 1917 of New Jersey provides: "The board of chosen freeholders of any county in this State may cause to be employed within such county any and all prisoners in any county jail under sentence, or committed for non-payment of a fine and costs, or committed in default of bond for non-support of the family."

The labor at which appellant would be "employed" would be "hard labor," because it would be involuntary servitude, irrespective of whether it happened to be physically arduous or easy. Bouvier Law Dict., "Hard Labor"; *United States* v. *Moreland,* 258 U. S. 433, 444, (dissent); *Ex parte Wilson,* 114 U. S. 417, 428. Moreover, there seems to be no restriction as to the kind of labor the "freeholders" or the "master" can select. The statute gives them free rein. They can make it just as "hard," using the word in its ordinary sense, as they choose, and, as already noted, the test is not what is likely to be done, but what may be done.

8. Any crime punishable by imprisonment is infamous. An infamous crime is one, conviction of which is supposed *ipso facto* to destroy one's good name. Therefore, accusation of it implies damage, and special damage need not be averred or proved. In the opinions of the people, it has long been considered that a crime punishable directly by imprisonment, (not in default of the payment of a fine,) in any sort of criminal jail or prison, is "infamous." Only offenses that are punishable by fine are not infamous. Odgers on Libel and Slander, 5th ed., 38–43.

Mr. Solicitor General Beck and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, appeared for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Dismissal of a writ of *habeas corpus* is assailed by this appeal. It was issued to review the legality of a conviction upon information and a sentence of imprisonment upon it. In detail of the grounds and justification of it, the charge of the petition is that appellant was proceeded against in the District Court upon an information charging him with a violation of § 21, Title II, of the Act of Congress of October 28, 1919, c. 85, 41 Stat. 305, 314, the National Prohibition Act, and convicted on the 17th day of June, 1920, and sentenced to pay a fine of $500.00, and be imprisoned for sixty days. In execution of the sentence it is alleged that he was committed to the custody of the appellee, he being the United States marshal for the Eastern District of New York.

The further allegation of the petition is that the court "never acquired jurisdiction of the pretended criminal action upon which, in form, it tried and condemned" him, "for the reason that the crime of which" he "was charged and for which said Court sought to try and condemn" him "is an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States and no presentment or indictment of a Grand Jury charging same, was ever filed or presented."

After hearing, the writ was discharged and appellant was remanded to the custody of the marshal to serve his sentence under the commitment, which was to the county jail of Essex County, New Jersey.

Is the contention of appellant justified in that his was a conviction and commitment of an infamous crime? It is upon this contention that his petition rests.

It has been decided that a crime takes on the quality of infamy if it be one punishable by imprisonment at hard labor or in a penitentiary, and must be proceeded against upon presentment or indictment of a grand jury. *Ex parte Wilson,* 114 U. S. 417; *Mackin* v. *United States,* 117 U. S. 348; *United States* v. *Moreland,* 258 U. S. 433. And such is the quality of the crime and the procedure against it if the statute authorizes the court to condemn to such punishment. See also *In re Bonner,* 151 U. S. 242; *In re Mills,* 135 U. S. 263.

Or, to put it as counsel puts it, "The construction of the Fifth Amendment to the Constitution is this: An infamous crime is one that carries infamous punishment; the test does not depend upon the punishment that ultimately happens to be inflicted, but upon the punishment the court *has power* to inflict."

To show the pertinence of the test and its adaptation to the case, it is the contention of the appellant that the court had power, and only power, to sentence him to imprisonment in a penal institution of New York, and that by the law of the State, by federal statute made applicable to federal prisoners therein, imprisonment is at hard labor.

The argument by which the contention is attempted to be sustained is somewhat strained. It rests upon the power the statutes give to the courts to specify the places of imprisonment, which began, it is said, in 1789. By a resolution then passed, the state legislatures were recommended to receive and keep prisoners committed under the authority of the United States "under the like penalties as in the case of prisoners committed under the authority of such States respectively. . . ." 1 Stat. 96.

The purpose thus expressed was in substance repeated subsequently, and §§ 5537 and 5538, Rev. Stats., reproducing a resolution adopted in 1821 (3 Stat. 646); §§ 5542 and 5548, reproducing 4 Stat. 118, and 4 Stat. 777, are

cited. Sections 5546 and 5541 are also cited, they having their origin in 13 Stat. 74, and 500.

It is provided in §§ 5537 and 5538 that, where a State does not allow the use of its jails to United States prisoners, the marshal under direction of the court may hire or procure a temporary jail, and that the marshal shall make provisions for the safe keeping of prisoners until permanent provision for that purpose is made by law.

By § 5542, where the sentence is imprisonment to hard labor, the court may direct its execution "within the district or State where such court is held."

Section 5548 provides that where punishment for an offense is by fine or imprisonment it may be executed in any house of correction or house of reformation for juvenile delinquents "within the State or district where" such court is held.

Section 5546 provides that the place of imprisonment, where there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, may be in some suitable jail or penitentiary in a convenient State or Territory to be designated by the Attorney General. And power to change is given to the Attorney General.

The provisions of these sections seem adaptive to all imprisonments and to all grades of crime. In other words, have an adaptive and harmonious relation, and such relation they were declared to have in *In re Karstendick*, 93 U. S. 396. Appellant, however, contends that § 5546 may be treated as a proviso of §§ 5541 and 5542, and that the latter sections "define the only instances in which a United States court can sentence a prisoner to confinement in a 'state jail or penitentiary' within the State, that is, when the statute requires hard labor as part of the punishment or when the imprisonment is for more than a year, and that, therefore, when the sentence is in terms to imprisonment merely, for a year or less,

the court has no power to sentence the prisoner 'to a suitable jail or penitentiary in a convenient State . . . designated by the Attorney General.'"

We are not impressed with the contention. The reasoning to sustain it is that Congress "could give District Courts the power to sentence short-term convicts to institutions beyond the limits of their ordinary jurisdiction, but it hasn't." And further, "although Congress was willing, when the facts justified, that a long-termer should be sent beyond the borders of his State, they were unwilling that a short-termer should be so dealt with."

The reasoning does not convince us. We prefer, and accept, the clear and direct power given to the Attorney General (§ 5546), and there is nothing in *In re Mills* and *In re Bonner* that militates against it.

In re Mills decided that when a statute does not require imprisonment in a penitentiary, a sentence cannot impose it unless the sentence is for a period longer than one year. *In re Bonner* is to the same effect. In other words, the sentences cannot transcend those of the statutes. In both cases the sentences were convictions upon indictments. They are authorities against, not for, the appellant. His contention changes the penalty of the statute and therefore repels. The statute provides that, for the offense here charged, the offender shall be fined not more than $1,000 or imprisoned not exceeding one year, or both. (§ 21.) Where the charge is selling, as in the *Wyman Case, post,* 14, the punishment, for the first offense, is a fine not more than $1,000, and imprisonment not exceeding six months. National Prohibition Act, § 29, 41 Stat. 316.

The statute excludes the imposition of hard labor or imprisonment in a penitentiary. Under the contention of appellant both would be imposed. Imprisonment must be, is the assertion, in a New York penitentiary, and at hard labor, the latter consequence because of the

Appellant, while particularly insistent upon the New York law and the absence of power to imprison elsewhere than in a New York institution, however, contends that the imprisonment in the Essex County jail is at hard labor because the conduct or discipline of that jail requires or permits the imposition of hard labor, and thereby constitutes the crime infamous. If that can be so held it gives the court power to transcend the statute which, as we have said, does not include hard labor in its punishment. But such peremptory requirement cannot be assigned to the New Jersey law—neither employment at hard labor nor any labor. The law is made adaptive to circumstances, made so by committing its administration to the judgment of the freeholders of the county, and it is limited to prescribing suitable employment of prisoners to accomplish the purpose of the law. Laws of New Jersey of 1917, page 888. The law gives no indication that the employment is or may be prescribed as punishment. It proceeds along other lines.

It follows that the sentence of the court was not intended to be and could not have been to imprisonment at hard labor.

We find no error in the decision of the court in discharging the writ and its action is

Affirmed.

Mr. Justice McReynolds and Mr. Justice Brandeis concur in the result.

WYMAN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 140. Argued October 4, 1923.—Decided October 22, 1923.

Decided upon the authority of *Brede* v. *Powers, ante,* 4. Affirmed.

ERROR to the District Court for the Eastern District of New York, to review a judgment sentencing the plaintiff in error to imprisonment for 45 days in the Essex County Jail, Newark, New Jersey, for the offense of selling whisky for "beverage purposes," in violation of § 3, Title II, of the National Prohibition Act, 41 Stat. 305, 308. The prosecution was by information.

Mr. Otho S. Bowling, with whom *Mr. Robert H. Elder* was on the briefs, for plaintiff in error.

Mr. Solicitor General Beck and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, appeared for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Plaintiff in error was proceeded against by an information for the violation of a section of the National Prohibition Act.

A motion was made to dismiss the information on the ground that the crime charged was an infamous one within the meaning of the Fifth Amendment to the Constitution of the United States, in that by reason of the statutes of the United States and those of New York and New Jersey, the court had power to impose an infamous punishment, namely imprisonment at hard labor and

imprisonment at involuntary labor, and that, therefore, Wyman could not be held to answer for such crime except upon presentment or indictment by a grand jury.

The motion was denied and after trial plaintiff in error was found guilty and sentenced to imprisonment for a term of 45 days in the Essex County jail, Newark, New Jersey.

To review this conviction and sentence is the purpose of this writ of error.

It will be observed that the case is identical in its legal aspects with *Brede* v. *Powers,* just decided, *ante,* 4. For the reasons stated in the opinion in that case, the proceedings, action and judgment are

Affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS concur in the result.

UNITED STATES *v.* WALTER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 20. Argued October 3, 1923.—Decided October 22, 1923.

1. The Act of October 23, 1918, so amending § 35 of the Criminal Code as to make it a crime to make or present, for payment, a fraudulent claim against "any corporation in which the United States of America is a stockholder," should be construed to refer only to corporations, like the Fleet Corporation, that are instrumentalities of the Government and in which, for that reason, it owns stock. P. 17.
2. The act, so construed, is constitutional. *Id.*
3. A conspiracy to "defraud the United States in any manner," as denounced by § 37 of the Criminal Code, includes a conspiracy to defraud the Fleet Corporation, which, if successful, would result directly in pecuniary loss to the United States (holding all the stock) and impair the efficiency of the corporation as a governmental instrumentality. P. 18.

291 Fed. 662, reversed.

ERROR to a judgment of the District Court sustaining a demurrer to an indictment.

Mr. Solicitor General Beck for the United States.

Mr. Jno. W. Dodge, for defendant in error, submitted.

The courts cannot limit the meaning of the words used so as to carve out a crime, by construing the statute to mean that it applies only under certain conditions of fact which are not expressed, and thus render it constitutional. *United States* v. *Wiltberger,* 5 Wheat. 76; *Hackfield & Co.* v. *United States,* 197 U. S. 442; *Burton* v. *United States,* 202 U. S. 377; *United States* v. *Hartwell,* 6 Wall. 385; *Cherokee Tobacco Co.* v. *United States,* 11 Wall. 616; *Texas* v. *Chiles,* 21 Wall. 488; *Trade-Mark Cases,* 100 U. S. 82; *Poindexter* v. *Greenhow,* 114 U. S. 270; *Baldwin* v. *Franks,* 120 U. S. 678; *United States* v. *Fox,* 95 U. S. 670; *McCulloch* v. *Maryland,* 4 Wheat. 421; *United States* v. *Reese,* 92 U. S. 214; *United States* v. *Harris,* 106 U. S. 629.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an indictment in three counts. The first charges a conspiracy to commit an offense against the United States by making and presenting for payment a fraudulent claim against the United States Emergency Fleet Corporation, a corporation formed under the laws of the District of Columbia, of which the United States owned all the stock. The second count charges a like conspiracy to obtain the payment of fraudulent claims against the same corporation. The third count charges a conspiracy to defraud the United States. All the counts are based upon the same facts, and the first two are brought under the Act of October 23, 1918, c. 194; 40 Stat. 1015; amending § 35 of the Criminal Code and,

taken with § 37, making it a crime to conspire to present for, or to obtain, payment of a fraudulent claim against "any corporation in which the United States of America is a stockholder." The third count is based upon § 37 of the Criminal Code, Act of March 4, 1909, c. 321; 35 Stat. 1088, punishing conspiracy "to defraud the United States in any manner or for any purpose." A demurrer to all the counts was sustained by the District Court on the grounds that the Act of 1918 must be taken literally, as embracing any corporation in which the United States owned a single share of stock, and so construed went beyond the power of Congress, and that under *United States* v. *Strang,* 254 U. S. 491, the fraud alleged was not a fraud upon the United States.

Taking up first the Act of 1918, it was enacted after Congress contemplating the possibility of the war that ensued had authorized the formation of the Fleet Corporation under laws deriving their authority from earlier statutes of the United States. We are not informed whether at that time the United States owned stock in corporations other than the instrumentalities created with reference to the needs of that war, but we cannot doubt that the act was passed with a special view to them. *United States* v. *Bowman,* 260 U. S. 94, 101, 102. The United States can protect its property by criminal laws, and its constitutional power would not be affected if it saw fit to create a corporation of its own for purposes of the Government, under laws emanating directly or indirectly from itself, and turned the property over to its creature. The creator would not be subordinated to its own machinery. That is the case before us. If the law in terms dealt only with the Emergency Fleet Corporation it would be beyond question. See *United States Grain Corporation* v. *Phillips,* 261 U. S. 106, 113. It is said however that the words "any corporation in which

the United States of America is a stockholder" are too clear to be cut down. *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126, 136, 137. But against the cases that decline to limit the generality of words in order to save the constitutionality of an act are many others that imply a limit, and, when the circumstances permit, the latter course will be adopted. Language as absolute as that before us was limited in *The Abby Dodge*, 223 U. S. 166, 172: "Any sponges taken . . . from the waters of the Gulf of Mexico or Straits of Florida." See *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217. We are of opinion that the Act of 1918 should be construed to refer only to corporations like the Fleet Corporation that are instrumentalities of the government and in which for that reason it owns stock. In *United States* v. *Bowman*, 260 U. S. 94, the present objection was not raised by counsel or by the Court.

As to the third count, while it is true that the corporation is not the United States, *United States* v. *Strang*, 254 U. S. 491, the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument. We are of opinion that it was within the words of § 37, "defraud the United States in any manner," and that on this as on the other point the decision below was wrong. *Haas* v. *Henkel*, 216 U. S. 479, 480. *United States* v. *Barnow*, 239 U. S. 74, 79.

Judgment reversed.

AMERICAN RAILWAY EXPRESS COMPANY *v.* LEVEE.

CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, OF THE STATE OF LOUISIANA.

No. 54. Argued October 8, 1923.—Decided October 22, 1923.

1. When by the constitution of a State the jurisdiction of its highest court to review a judgment of an intermediate tribunal is discretionary, and review is declined, the writ of certiorari from this Court should be addressed to the intermediate tribunal. P. 20.
2. The fact that the highest state court in such case, being required by the state constitution to give reasons for declining, does so by an opinion upon the merits, does not take from the refusal its character of declining jurisdiction. P. 21.
3. The limit of time for applying here for certiorari dates from the refusal of the highest state court to review the decision of the intermediate court. *Id.*
4. A state statute placing upon the carrier, when sued for the value of goods consigned but not delivered, the burden of proving that the loss or damage was occasioned by accidental and uncontrollable events (La. Rev. Civ. Code, Art. 2754,) cannot affect a limitation of liability for an interstate shipment agreed upon and valid under the federal law. P. 21.

Reversed.

CERTIORARI to a judgment of the Court of Appeal of Louisiana, First Circuit, which affirmed a judgment for damages, recovered by the respondent against the petitioner Express Company.

Mr. Arthur A. Moreno, with whom *Mr. Hunter C. Leake, Mr. A. M. Hartung* and *Mr. H. S. Marx* were on the briefs, for petitioner.

Mr. Charles T. Wortham for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondent in a court of Louisiana to recover the actual value of a trunk and its contents, weighing one hundred pounds or less, delivered to the petitioner for carriage from Madisonville, Texas, to Thibodaux, Louisiana, but not delivered by the latter. The plaintiff's petition set forth the receipt given by the Company, which was in the usual form approved by the Interstate Commerce Commission, and by which "In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less . . . the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less"; with other language to the same effect. At the trial the defendant relied upon this limitation of its liability. But the Court following Article 2754 of the Revised Civil Code of Louisiana held that the burden was on the carrier to "prove that [the] loss or damage has been occasioned by accidental and uncontrollable events," and gave the plaintiff judgment for $863.75 and interest. The Court of Appeal took the same view and said that failure to make that proof was equivalent to an admission of converting the property to its own use. The defendant applied to the Supreme Court of the State for a writ of certiorari, but the writ was "refused for the reason that the judgment is correct."

A preliminary objection is urged that the present writ of certiorari was addressed to the Court of Appeal and not to the Supreme Court. But under the Constitution of the State the jurisdiction of the Supreme Court is discretionary, Art. 7, § 11, and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, *Stratton* v. *Stratton*, 239 U. S. 55, when the jurisdiction was declined the Court of Appeal was shown to be the highest Court

of the State in which a decision could be had. Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining jurisdiction. *Western Union Telegraph Co.* v. *Crovo,* 220 U. S. 364, 366. *Norfolk & Suburban Turnpike Co.* v. *Virginia,* 225 U. S. 264, 269. Of course the limit of time for applying to this Court was from the date when the writ of certiorari was refused.

Coming to the merits, the limitation of liability was valid, whatever may be the law of the State in cases within its control. *Adams Express Co.* v. *Croninger,* 226 U. S. 491. *Union Pacific R. R. Co.* v. *Burke,* 255 U. S. 317, 321. *American Ry. Express Co.* v. *Lindenburg,* 260 U. S. 584. The effect of the stipulation could not have been escaped by suing in trover and laying the failure to deliver as a conversion if that had been done. *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190, 197. No more can it be escaped by a state law or decision that a failure to deliver shall establish a conversion unless explained. The law of the United States cannot be evaded by the forms of local practice. *Rogers* v. *Alabama,* 192 U. S. 226, 230. Under the law of the United States governing interstate commerce the stipulation constituted a defence to liability beyond fifty dollars, unless the plaintiff should prove some facts that took the case out of the protection of the contract. It had that scope in whatever Court it came up. The local rule applied as to the burden of proof narrowed the protection that the defendant had secured, and therefore contravened the law. See *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507, 512. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin,* 241 U. S. 319, 328. *E. Borneman & Co.* v. *New Orleans M. & C. R. Co.,* 145 La. 150.

We think it unnecessary to follow the arguments addressed to us into further detail.

Judgment reversed.

DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* WECHSLER.

CERTIORARI TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

No. 70. Argued October 12, 1923.—Decided October 22, 1923.

1. A decision of a state court denying an objection to jurisdiction based on a federal regulation, upon the ground that the objection was waived by the appearance of the party making it, is reëxaminable by this Court. P. 24.
2. Where the Director General of Railroads, being sued upon a cause of action for personal injuries, in a state court whose practice permitted uniting a plea to the jurisdiction with a defense on the merits, pleaded a general denial and also that the court was without jurisdiction because the action was not brought in the proper county as required by a federal regulation governing the place for suits against carriers while under federal control, and his successors, designated by the President under the Transportation Act, 1920, successively entered appearance and adopted the answer theretofore filed, *held*, that a decision of the state court, treating the objection to the jurisdiction as going to the venue of the cause and as waived by the appearances, could not be sustained as a decision disposing of the case on a local ground independent of the federal question raised. *Id.*
3. The Transportation Act, 1920, § 206, (a), (d), does not invalidate a defense good when it was passed. P. 25.

209 Mo. App. 570, reversed.

CERTIORARI to a judgment of the Kansas City Court of Appeals, (the Supreme Court of Missouri having declined to review,) awarding damages to the plaintiff Wechsler, for personal injuries suffered upon a railroad, while it was under federal control.

Mr. Roy B. Thomson, with whom *Mr. O. H. Dean, Mr. Albert E. Stoll, Mr. H. M. Langworthy* and *Mr. M. W. Borders* were on the briefs, for petitioner.

Mr. William S. Hogsett, with whom *Mr. Murat Boyle* and *Mr. Mont T. Prewitt* were on the briefs, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit for personal injuries suffered by the plaintiff (the respondent here) upon the Chicago Great Western Railroad on January 3, 1920, while that road was under federal control. The suit was brought against Walker D. Hines, the Director General, on January 29, 1920, in the Circuit Court of Jackson County, Missouri. The cause of action arose in another county and the plaintiff then and when the suit was brought resided in Illinois. By General Order 18-A it was ordered that "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose." The defendant pleaded a general denial and also that the Court was without jurisdiction because of the foregoing facts. The plaintiff by replication relied upon the invalidity of the order, a point now decided against him. *Alabama & Vicksburg Ry. Co.* v. *Journey,* 257 U. S. 111. On February 25, 1921, the plaintiff amended and John Barton Payne, Director General of Railroads and agent designated by the President under Transportation Act, 1920, was substituted by agreement as successor of Hines and according to the record the "substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant." It was not disputed and was stated

by the Court below that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defence on the merits, but it was held by the Court of Appeals, affirming a judgment for the plaintiff, that the provision in General Order 18-A went only to the venue of the action and was waived by the appearance of Payne. A similar effect was attributed to the appearance of the present petitioner Davis in the place of Payne. A writ of certiorari was denied by the Supreme Court of the State.

We are of opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defence on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward* v. *Love County*, 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge Knights of*

Pythias, 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American Ry. Express Co.* v. *Levee,* decided this day, *ante,* 19.

The Transportation Act, 1920, February 28, 1920, c. 91, § 206, (*a*) and (*d*); 41 Stat. 456, 461, 462, in no way invalidates a defence good when it was passed.

Judgment reversed.

DIRECTOR GENERAL OF RAILROADS *v.* KASTENBAUM.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 39. Argued October 3, 4, 1923.—Decided November 12, 1923.

Under § 10 of the Federal Control Act, an action for false imprisonment may be maintained against the Director General of Railroads by a person, who, at the instigation of railroad detectives, (agents of the Director General,) acting without probable cause, was arrested without warrant for a theft of freight from the railroad while under federal control. P. 27.

198 App. Div. 966; 199 id. 957, affirmed.

CERTIORARI to the Supreme Court of New York to review a judgment for damages recovered by the respondent from the petitioner in an action for false imprisonment. The judgment was affirmed by the Appellate Division and leave to appeal to the Court of Appeals was denied.

Mr. Thomas R. Wheeler, with whom *Mr. Lyman M. Bass* was on the brief, for petitioner.

Mr. Israel G. Holender for respondent.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Respondent brought an action in the Supreme Court of Erie County, New York, against the Director General of Railroads, seeking damages for false imprisonment and malicious prosecution. The trial court, at the close of the plaintiff's case, dismissed the cause of action for malicious prosecution, but allowed the trial to proceed to verdict and judgment for $500 for false imprisonment. The judgment was affirmed by the Appellate Division of the Supreme Court and a motion for leave to appeal was denied by the Court of Appeals of the State.

The brief for petitioner on the merits states the single question to be:

Does an action for false arrest lie against the petitioner, an officer of the United States Government, under the provisions of § 10 of the Act of Congress of March 21, 1918, c. 25, 40 Stat. 451, providing for federal control of carriers?

Twenty-one tubs of butter were taken from a freight car of the Lehigh Valley Railroad in Buffalo. A trolley car of that city, late at night, collided with a horse and wagon and, in the wreck which followed, the stolen tubs of butter were discovered. Two men who had been driving the wagon escaped. The detective force of the railway company sought to discover the owner of the horse and thought they had traced the ownership to Kastenbaum, who was a huckster. The railroad detective notified the police authorities of the city, who detailed two policemen to accompany him to Kastenbaum's house, where they arrested him without warrant. They took him to a police station and kept him there over night and until he was released the next day on bail. He was brought to a hearing before an examining magistrate on a charge of grand larceny and burglary. After four or five adjournments, at the instance of the prosecution, the magistrate discharged Kastenbaum. His horse proved to be one of another color. Under the charge of the court

the jury were permitted to return only compensatory damages.

Section 10 of the Federal Control Act provides:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

By General Order No. 50, the Executive so limited suits to be brought against carriers for injuries to person or property under the section as to exclude those for recovery of fines, penalties and forfeitures.

As we said in *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, 563:

"The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it."

The action for false imprisonment is in the nature of a trespass for a wrong or illegal act in which the defendant must have personally participated directly or by indirect procurement. The gist of it is an unlawful detention, and that being shown the burden is on the defendant to establish probable cause for the arrest. The want of probable cause, certainly in the absence of proof of guilt or conviction of the plaintiff, is measured by the state of

the defendant's knowledge, not by his intent. It means the absence of probable cause known to the defendant when he instituted the suit. But the standard applied to defendant's consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did. Holmes on the Common Law, 140. Probable cause is a mixed question of law and fact. The court submits the evidence of it to the jury, with instructions as to what facts will amount to probable cause if proved. *Stewart* v. *Sonneborn*, 98 U. S. 187, 194; Pollock on Torts, 8th ed., p. 225; Cooley on Torts, 3d ed., Vol. 1, p. 321. Counsel for petitioner contends that, in an action against the sovereign government, it must be conclusively presumed that good faith existed upon its part so far as it is responsible for the arrest, and therefore that a complete defense of probable cause on its part is always made out. But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable.

The Government under § 10, in a case of false imprisonment, stands exactly as if it were a railway corporation operating as a common carrier. Such a corporation would clearly be responsible for an arrest of the kind here shown, if without probable cause and made by one of its detectives employed to protect the property entrusted to its care as a common carrier. It is within the scope of the agency of such an employee to discover the perpetrators of crime against the property in order to recover it and to procure the arrest of supposed offenders and their prosecution and conviction in order to deter others from further depredations. If, in the field of such employment, the agent acts without probable cause and an illegal arrest without judicial warrant is made, the corporation

is liable as for any other act of its agents within the scope of their employment in carrying on the business of a common carrier. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Quigley,* 21 How. 202, 210; *Genga* v. *Director General of Railroads,* 243 Mass. 101.

We have not before us the question whether the Director General might be held for exemplary damages in a case like this, under the restrictions of Order No. 50, as construed in the *Ault Case,* because, as already said, the court limited the recovery to compensatory damages.

Affirmed.

DENBY, SECRETARY OF THE NAVY OF THE UNITED STATES, *v.* BERRY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 47. Argued October 5, 1923.—Decided November 12, 1923.

1. The act establishing the Naval Reserve Force, (August 29, 1916,) impliedly empowered the President, at his discretion, or the Secretary of the Navy acting for him, to change the status of an officer of that force from active service in the Navy to the status of inactive duty. P. 32.
2. A mere change of status from active service, to inactive duty in the Naval Reserve Force, is not a retirement within the meaning of Rev. Stats., § 1455, which refers to officers in the Regular Navy; nor under the Acts of July 1, 1918, and June 4, 1920, which made that section applicable to officers on active service in the Reserve Force when disabled in the line of duty. P. 34.
3. An order of the Secretary of the Navy retiring an officer to inactive duty in the Naval Reserve Force being discretionary, the Secretary cannot be required by mandamus to revoke it, even though based on his erroneous belief that such officer was not entitled under the Acts of July 1, 1918, and June 4, 1920, to be retired on pay when disabled in line of duty. P. 36.
4. A naval regulation providing that when any officer on the active list becomes physically incapacitated to perform his duties, he will

be ordered before a retiring board (Nav. Reg. 1913, 331 [5]) did not bind the Secretary as a rule of law, under Rev. Stats., § 154, after it was transferred to the instructions to naval retiring boards by order of the President. (Nav. Courts and Boards, 1917, § 679.) P. 37.

5. The right of a naval officer, disabled in the line of duty, to be retired on pay, is dependent by statute on the judgment of the President, not that of the courts; and the remedy of the officer when his application for a retirement board is disapproved by the Secretary, is by appeal directly to the President. (Nav. Ins. 1913, § 5323.) P. 38.

51 App. D. C. 335; 279 Fed. 317, reversed.

ERROR to a judgment of the Court of Appeals of the District of Columbia, which affirmed, in part, a mandamus issued by the Supreme Court of the District requiring the Secretary of the Navy to revoke an order directing the release of the relator, Berry, from active service in the Navy, and to make an order sending him before a retiring board, with a view to his retirement by the President.

Mr. George Ross Hull, with whom *Mr. Solicitor General Beck, Mr. Rufus S. Day,* Special Assistant to the Attorney General, and *Mr. George Melling* were on the brief, for plaintiff in error.

Mr. Daniel Thew Wright, with whom *Mr. Philip Ershler* was on the brief, for defendant in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a petition for mandamus filed in the Supreme Court of the District of Columbia by a member and officer of the Naval Reserve Force, as relator, to compel the Secretary of the Navy to revoke an order directing the release of the relator from active service in the Navy and to make an order sending him before a Retiring Board, with a view to his retirement by the President.

The Supreme Court sustained a demurrer to the amended answer of the Secretary and, the latter electing not to plead further, the court issued a mandamus as prayed. The Secretary carried the case on appeal to the Court of Appeals of the District, which affirmed the part of the mandamus directing revocation of the order of release and reversed the part requiring that the Secretary send the relator before a Retiring Board. The Secretary brings this writ of error to the judgment of the Court of Appeals. The case involves the construction of the general statutes of the United States applicable to the Naval Reserve Force and the retirement of its officers. We, therefore, have jurisdiction of the writ under § 250, par. 6, of the Judicial Code.

The relator, being an officer in the Naval Reserve Force, was ordered before a naval board of medical survey, and on October 14, 1919, was found by that board to be under permanent disability which was incurred in line of duty and was not the result of his own misconduct. The board recommended that the relator be sent before a retiring board. The Secretary of the Navy forwarded this recommendation to the Bureau of Navigation, the executive bureau of the Navy, disapproved, and directed that "this officer be ordered to proceed to his home and be released from active duty". The Bureau of Navigation, on November 17, 1919, accordingly issued to the relator this announcement: "You are hereby detached from such duty as may have been assigned you; you will proceed to your home and regard yourself honorably discharged from active service in the Navy". The relator wrote to the Secretary of the Navy requesting that his case be referred to a retiring board for consideration, to which the Secretary replied denying the plaintiff's right either to have his case so considered or to be placed on the retired list. The next day, November 18, 1919, this action was brought.

The Court of Appeals held that because the relator as Naval Reserve officer, if disabled in the line of duty, was eligible for retirement under the same conditions as provided for regular naval officers, and because no officer of the Navy could under § 1455, Rev. Stats. be retired from active service or wholly retired without a full and fair hearing before a navy retiring board if he should demand it, the Secretary had retired him from the service in violation of law and that he could be compelled to revoke his action. This would reinstate him to the status of a Naval Reserve officer in the active service with full pay as such from October 18, 1919.

The Naval Reserve Force was established by the Naval Appropriation Act of August 29, 1916, c. 417, 39 Stat. 556, 587. By its provisions, the Naval Reserve Force was to be composed of citizens of the United States who by enrollment therein or transfer thereto should obligate themselves to serve in the Navy in time of war or during an emergency declared by the President. Enrollment was to be for four years. A clothing gratuity was allowed and retainer pay of $12.00 a year or more according to class was to be paid to those who kept the Secretary advised of their whereabouts. The same grades and ranks were provided up to the rank of Lieutenant Commander as existed in the rank and file of the Navy. The President commissioned the commissioned officers. The Secretary issued warrants to the warrant officers. During peace or when no national emergency existed, members might be discharged at their own request on return of the clothing gratuity. Members might be ordered into active service in the Navy by the President in time of war or when in his opinion a national emergency existed, and might be required to perform such service throughout the war or until the national emergency ceased to exist. Enrolled members were to be subject to the laws, regulations and orders for the government of the regular Navy

only during such time as they might be required in the active service. The members of the Force when in active service were entitled to the same pay, allowance, gratuities and other emoluments as men of the same rank or grade in the regular Navy, but when on inactive duty they were entitled only to what was expressly provided in the act. The Secretary of the Navy was to make all necessary and proper regulations not inconsistent with law for the administration of these Naval Reserve Force provisions.

It is quite evident from the foregoing that members of this force occupied two statuses, one that of inactive duty, and the other of active service. It is further clear that it was within the power of the President, and of the Secretary of the Navy acting for him, to change the members of the Reserve Force from one status to the other. The power to call them from inactive duty to actual service was express. The power to order them from actual service to inactive duty was necessarily implied. How this should be done, was within the discretion of the President and his alter ego in the Navy Department, the Secretary. *United States* v. *Jones*, 18 How. 92, 95. The vesting of the right to make regulations to carry out the act in the Secretary shows that he was to act for the President. As a matter of practice in the Department, the method of calling out the members of the Reserve Force, and of sending them back to inactive duty, was by order of the Secretary of the Navy (Gen. Order No. 237 of October 6, 1916) left to the Bureau of Navigation, and under that Bureau mobilization and demobilization of the Reserve Force were carried on under special orders and circulars. Orders releasing individuals from active service and putting them on inactive duty were clearly within the power of the President and of the Secretary of the Navy acting for him in the administration of the

act. Nowhere is there found any limitation upon the discretion of the Executive in this regard. The orders in such cases were in the nature of military orders by the Commander-in-Chief in the assignment or withdrawal of available forces to or from duty for the good of the service. Such orders of withdrawal could not and did not make members of the Naval Reserve Force civilians. They did not release them from obligation under their enrollment to render active service again when ordered to do so by the proper authority. When the Bureau of Navigation detached relator from active duty and told him to go home and regard himself as honorably discharged from active service in the Navy, he was not ousted from the Naval Reserve Force or the Navy. The words "honorably discharged" were only to advise him and others that the change of his status from active to inactive duty was not because of his fault or misconduct.

The Court of Appeals, however, construed this order to be an effort to retire the relator from the Navy in the sense in which that term is used in § 1455, Rev. Stats., which reads as follows:

"No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy retiring-board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion."

This section was adopted in 1861 (c. 42, 12 Stat. 291.), and applied to regular officers in the Navy. The retirement from active service, and complete retirement provided in the section, are to be understood as they apply to such officers. Officers in the Regular Navy who have become unfit for service before the retiring age are subject to three methods of retirement. One is when the disability is in the line of duty and their retirement pay is

three-fourths of the pay of their rank on active duty. The other two are when the disability is not incurred in line of duty; and in one the retirement pay is furlough or one-half of leave of absence pay of their rank in active service, and in the other there is full retirement to civilian life on a year's full pay of their rank. §§ 1453, 1454, Rev. Stats. Section 1455 was enacted to prevent an abuse of the power of retirement by superior officers. Section 1455, Rev. Stats., has been made applicable to officers on active service in the Naval Reserve Force when disabled in line of duty, first by implication in a proviso of the Act of July 1, 1918, c. 114, 40 Stat. 704, 710, "that no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty;" and then, after this suit was brought, by direct provision in Act of June 4, 1920, c. 228, 41 Stat. 834, as follows:

"That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty."

By Act approved July 12, 1921, c. 44, 42 Stat. 122, 140, the above was amended by adding a proviso as follows: "*Provided, however,* That application for such retirement shall be filed with the Secretary of the Navy not later than October 1, 1921." The proviso shows reflexively that Congress had always intended to give one entitled to retirement the right to apply for it.

To be retired from active service under the sections from 1448 to 1455, Rev. Stats., inclusive, means retired with pay and has had this meaning for many years. *Brown* v. *United States,* 113 U. S. 568, 572. To be wholly retired means to be removed from the service entirely on

payment of a lump sum and to become a civilian. *Miller* v. *United States,* 19 Ct. Clms. 338, 353; 29 Ops. Atty. Gen. 401. No form of retirement is a removal by way of punishment. Indeed, § 1456, Rev. Stats., expressly forbids retirement because of misconduct on account of which an officer may be sent before a court martial. It is very clear, therefore, that a mere change of status from active service to inactive duty in the Naval Reserve Force is not a "retirement" in the meaning of § 1455, Rev. Stats., the Act of July 1, 1918, or that of June 4, 1920.

There was no reason why, after the relator had been ordered to inactive duty in the Naval Reserve Force, he might not have applied for retirement under the provision of the Act of 1918, or later under the Act of June 4, 1920.

But it is said that the Secretary directed the release of the relator from active service and refused him a retiring board because he was of opinion that under the Act of July 1, 1918, and before the Act of June 4, 1920, Reserve Force officers were not entitled to be retired on pay, but that they must apply for the relief extended to persons disabled in the service by §§ 300 and 302 of the War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 398, 405, 406. Because the Secretary gave a wrong reason for his action is not a ground for requiring him by mandamus to revoke the order putting the relator on inactive duty, if he had discretion to do this, as we have found he did have.

Nor was the Secretary of the Navy under obligation to order the relator before a retiring board because a board of medical survey recommended it.

Section 1448, Rev. Stats., provides that whenever an officer reports himself unable to perform his duties or whenever in the opinion of the President he is incapacitated, the President may in his discretion direct the Secretary of the Navy to refer the case to a Retiring Board. By the following sections, 1449 to 1454, the Board is to report its finding as to the incapacity of the officer, and,

if it exists, whether it was an incident of the service. The record is to be transmitted to the Secretary and by him laid before the President, whose approval is necessary to the retirement.

The mode of dealing with cases of disability is covered by the regulations of the Navy approved by the President to which the statute gives the force of law. § 1547, Rev. Stats. Naval Regulation 361 of 1913 gave authority to the commander-in-chief of a fleet, commandant of a station, or other commanding officer, to order a medical survey of any person in his command. Under Regulation 364 the Board of Survey of an officer was authorized to recommend treatment, or sick leave, but if the disability was deemed permanent, it might recommend that the officer be ordered before a Retiring Board. By Regulation 365 when a person surveyed was within the United States or the waters thereof, or in the Caribbean or adjacent waters, and was found unfit for duty, and the commanding officer approved the finding and recommendation of the Board as to what should be done, this was to be carried out "except in cases involving discharge, travel, leave, or retirement, which shall be referred to the department."

Regulation 331, sub-division 5, once provided:

"When any officer on the active list becomes physically incapacitated to perform the duties of his office, and the probable future duration of such incapacity is permanent or indefinite, he will immediately be ordered before a retiring board, and pending final action upon the question of his retirement will not be examined for promotion".

Counsel for the relator has maintained that the Secretary by reason of this regulation is under a statutory duty to order a retiring Board for an officer physically incapacitated and that he has no discretion in the matter. Its history and the abuse it was intended to stop, as well as § 1448, would make such a construction hard to sustain, but we need not go into this. It suffices to say that,

adopted in 1915, it has since lost its statutory force. By order of the President, dated January 14, 1916, it was stricken from the Navy Regulations and was thereafter embodied in instructions to Naval Retiring Boards. (Sec. 679, Naval Courts and Boards, 1917.) Even if it could have been construed as claimed when it had the effect of law, it could not now be made the basis of a proceeding in mandamus against the Secretary. It governs his subordinates only and may be ignored by him. *United States* v. *Burns,* 12 Wall. 246, 252; *Smith* v. *United States,* 24 Ct. Clms. 209. A board of medical survey is simply an executive instrumentality which the Secretary may use to obtain an expert opinion as to the physical capacity of an officer or man. Its recommendations involving retirement must always come to the Secretary for his approval. In the due course of business in the Navy Department applications for retirement dependent on disability must also come before the Secretary who, acting for and in aid of the President, makes preliminary inquiry into the need of ordering a retiring board. The statute does not require the President to direct the Secretary of the Navy to refer a case to a retiring board. It expressly puts it in the discretion of the President to do so or not to do so. It would be a curious inconsistency in the procedure if the Secretary were compelled by law to order a retiring board to consider an officer's case which the President is given discretion to grant or withhold.

But it is argued that an officer disabled in the line of his duty is by § 1455 entitled as of right to retirement on pay and that the courts should secure him that right. The right is one dependent by statute on the judgment of the President and not on that of the courts. If on the preliminary inquiry of the Secretary, he disapproves the application for a retiring board, the officer may appeal directly to the President for action on his petition. This opportunity was provided by section 5323, Naval Instructions, 1913, and would exist without it.

For these reasons, we think that the demurrer to the answer should have been overruled.

Judgment reversed and the cause remanded for further proceedings.

McCONAUGHEY, FOR HIMSELF AND OTHERS, EMPLOYEES OF THE PANAMA CANAL AND OF THE PANAMA RAILROAD COMPANY, *v.* MORROW, GOVERNOR OF THE PANAMA CANAL, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 48. Submitted October 4, 1923.—Decided November 12, 1923.

1. In a suit in the United States District Court for the Canal Zone to restrain the Governor and other officials of the Panama Canal from carrying out an order of the President, upon the ground that plaintiffs will thereby be deprived of personal or property rights contrary to the federal laws and Constitution, an objection that the suit is in effect against the United States does not raise a question of the jurisdiction of the trial court as a federal court reviewable directly by this Court under Jud. Code, § 238, as amended January 28, 1915. P. 41.
2. The Act of September 21, 1922, providing that review by the Circuit Court of Appeals, Fifth Circuit, of judgments of the District Court for the Canal Zone shall include all questions of jurisdiction, was expressly inapplicable to cases then pending in the former court, and, by implication, does not affect a case which had passed through that court and was pending here on appeal from its judgment at the date of the act. P. 42.
3. The Panama Canal Act of August 24, 1912, in declaring "That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide," refers to regulations, etc., rising to the dignity of laws, for the purposes named, and did not divest the President of power to revoke previous ad-

ministrative orders and regulations, such as those allowing free quarters, fuel, electric current, water, etc., to government employees. P. 43.

4. Under the Act of March 4, 1907, debts owing the Government of Panama by government employees were deductible from their pay. P. 49.

279 Fed. 617, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the United States District Court for the Canal Zone, which dismissed the bill in a suit of a government employee in the Zone to restrain the Governor and other officials of the Canal from effectuating an order of the President making them chargeable with rent, fuel, etc.

Mr. Harry A. Hegarty and *Mr. John N. Breen* for appellant.

Mr. G. H. Martin for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a complaint filed in the United States District Court for the Canal Zone by Harvey McConaughey in behalf of himself and of all other Government employees occupying Government quarters in the Zone, against the Governor, Auditor and Paymaster of the Panama Canal, charging that the defendants were about to make a charge against complainants for rent, fuel, electric current, water and services in connection with their quarters on and after January 1, 1922, and in case of non-payment to deduct the same from their lawful pay or to oust them from their quarters, all in pursuance of and compliance with an order of the President of December 3, 1921, issued without legal authority and invalid because in conflict with the Constitution and laws of the United States.

The defendants made a motion to quash the order to show cause which had been issued against them and to dismiss the bill, because the case was one in effect against the United States, and because it sought to control the executive discretion vested by law and the Constitution in the President and his subordinates. The court sustained the motion, finding that the order of December 3, 1921, was within the legal authority of the President and under that order the defendants had the discretion to adopt the regulations, enforcement of which it was sought in the bill to enjoin.

An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit under § 9 of the Act of Congress of August 24, 1912, c. 390, 37 Stat. 560, 566. A motion to dismiss the appeal was made in the Circuit Court of Appeals, on the ground that it was based solely on a question of jurisdiction and therefore should have come directly to this Court on a certificate of jurisdiction under § 238 of the Judicial Code, as amended January 28, 1915, c. 22, 38 Stat. 804. The Circuit Court of Appeals held that the case did not present a question of jurisdiction of the District Court within § 238, that that section applied only to a question of the court's jurisdiction of the parties or subject matter as a federal court, and that no such issue had been raised here.

We agree with the Circuit Court of Appeals in this view. There is no doubt of the general jurisdiction of the District Court of the Canal Zone as a court of general jurisdiction to hear a suit brought by one resident of the Zone against another upon whom personal service can be had, in respect of any property or personal right of the plaintiff. The question here was whether the court could grant an equitable remedy against an officer of the Canal when, as asserted, it would in effect be an injunction against the United States. This was not a question of jurisdiction appealable direct to this Court. As was said

in *Fore River Shipbuilding Company* v. *Hagg*, 219 U. S. 175, 178:

"This court has had frequent occasion to determine what is meant in the statute providing for review of cases in which the jurisdiction of the court is in issue, and it has been held that the statute means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, but of the jurisdiction of the court as a Federal court." See also *Louisville Trust Company* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523.

By the Act of September 21, 1922, c. 370, § 3, 42 Stat. 1004, 1006, amending § 9, it is provided that review by the Circuit Court of Appeals of the judgments and decrees of the District Court of the Canal Zone shall include all questions of jurisdiction, thus making § 238 of the Judicial Code thereafter inapplicable to cases coming up from that court. The amendment, however, by its terms did not affect cases then pending in the Court of Appeals and provided that they were to be disposed of as if it had not been enacted. The present case was pending in this Court at the time, and we can not suppose, in view of the saving clause as to cases which had reached the Circuit Court of Appeals, that the act was intended to have any effect upon cases which had passed through the Circuit Court of Appeals and had been lodged here. We must deal with this case, therefore, as if the amendment of September 21, 1922, had not been passed. Under either statute, however, the whole case is before us on the sufficiency of the complaint presented below by the motion of the defendants to dismiss it.

The claim of the appellant is that he and those for whom he sues were employees of the Government engaged in and about its work in respect to the construction and operation of the Canal, that while the Isthmian Canal Commission was carrying on this task under the President, it had been its policy to furnish Government employees

quarters free of rent, that this policy was finally embodied in a regulation of the Commission effective April 1, 1907, as follows:

"Whenever practicable and in the best interest of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time", and that thereafter, by proper orders, free fuel, electric current and other service were allowed to employees in Government quarters.

These orders and regulations were in force when the Panama Canal Act was passed August 24, 1912, c. 390, 37 Stat. 560, containing as its second section the following:

"That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

Appellant contends that as all the regulations of the Commission were authorized by the President and unless revoked were to be taken as confirmed by him, they were by the § 2 just quoted made into an act of Congress and thereafter could not be revoked or amended save by another act of Congress otherwise providing. Hence, it is claimed that the Commission's regulation of April 1, 1907, with its succeeding orders on the same subject, has all the force of an act of Congress not to be amended by the President, and that by its terms all employees are entitled to free quarters and to the other privileges.

The force to be given to this claim depends primarily on the proper construction of § 2 of the Panama Canal Act of 1912, and that needs for its reasonable interpretation a short consideration of its legislative history.

On June 28, 1902, c. 1302, 32 Stat. 481, Congress passed a law entitled "An Act To provide for the construction of a canal connecting the waters of the Atlantic

and Pacific oceans", and known as the Spooner Act. It authorized the purchase of the rights of the New Panama Canal Company of France in the uncompleted canal and its holdings of the stock of the Panama Railroad Company and of the right of way from the government of Colombia, and enabled and directed the President to build and complete the canal, and for this purpose gave him authority to employ such persons as he might deem necessary and to fix their compensation. The act created a Commission through whom the President was to do the work, and provided for the issue of bonds to pay for the purchase and construction provided in the act. Thereafter Panama revolted from Colombia and was recognized by the United States, and on November 18, 1903, made a treaty with the United States (33 Stat. 2234) granting a right of way and transferring perpetual control of the Canal Zone to the United States for the construction of the Canal, which the United States undertook to build and operate. By Act of April 28, 1904, c. 1758, 33 Stat. 429, Congress provided for the payments to be made under the Treaty and the contract with the French Panama Canal Co., authorized the President, after such payments, to take possession of the territory conveyed by the treaty for canal purposes, and established the Zone conveyed as "The Canal Zone." Section 2 provided as follows:

"That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion."

Under this act, the President took possession of the Zone and directed that the Canal should be constructed and the Zone governed by him through the Panama Canal Commission under the supervision of the Secretary of War. Letter of President to Secretary of War, May 9, 1904. Executive Orders relating to Panama Canal, page 20. Executive Order dated November 17, 1906. *Idem*, page 55. A government was organized, a *modus vivendi* was agreed to with the government of Panama, and the construction of the Canal was carried on. A Governor of the Canal was appointed, courts were established and complete rules and regulations having the force of law were duly adopted and enforced. Law and order were thus maintained, persons violating these regulations were prosecuted and convicted, and the construction of the Canal was much aided by the governmental control exercised by the same body that carried on the great work. A volume of Canal laws thus enacted and a volume of Executive Orders relating to the Canal were published by the Canal authorities.

It will be noted that the second section of the Act of April 28, 1904, by which the President was authorized to establish a government in the Canal Zone and was given legislative power therein, was expressly limited in its duration to the expiration of the Fifty-eighth Congress, which occurred on the 4th of March, 1905. On March 6, 1905, the Secretary of War telegraphed the Governor of the Canal Zone, "Government of the Canal Zone will be continued to be administered in obedience to the laws of the United States in force in that territory, the Executive Orders heretofore issued, and the laws of the Canal Zone enacted by the Isthmian Canal Commission during the period the Commission was authorized under Act of Congress approved April 28, 1904, to exercise the power of legislation." (Treaties and Acts of Congress Relating to Panama Canal, Annotated, page 35, note). Between

1905 and 1912, when the Canal Act already cited was passed, there was no express legislation looking to the continuance of the powers of the President under the Act of April 28, 1904. The existence of the Government of the Canal Zone after March 4, 1905, was, however, recognized in appropriations for the payment of its employees and other of its expenses for 1906 (34 St. 762), for 1907 (34 St. 1370), for 1908 (35 St. 386), for 1909 (35 St. 1026), for 1910 (36 St. 772) and for 1911 (36 St. 1450). On January 21, 1907, the Secretary of War asked the Attorney General whether the power of the President to make laws in the Zone, conferred in the Act of April 28, 1904, had ceased at the close of the Fifty-eighth Congress, so that no further legislation could be adopted or existing legislation modified. The answer was that the provision in the law of 1904 was merely declaratory of what would have been the authority and duty of the President growing out of the Treaty and the Spooner Act, even if the Act of 1904 had not been enacted, that new legislation might be adopted by the President, and that Congress' acquiescence in, and approval of, the Government as carried on could be inferred from its appropriations to pay the Canal Government's expenses. Opinions of Attorneys General, vol. 26, p. 113. So the government of the Zone went on. Nevertheless, its legality was from time to time questioned, and on March 19, 1908, the House of Representatives passed a resolution asking the President that it be informed by what authority of law he exercised the functions of government in the Panama Canal Zone since the expiration of the Fifty-eighth Congress. 42 Congressional Record 3592. This was answered by the President in a message of April 4, 1908 (42 Congressional Record 4387), by stating the same grounds as those contained in the opinion of the Attorney General, already referred to. In his annual message of December 21, 1911 (Messages and Papers of the Presidents, Vol. XVII, pp. 7681, 7687),

the President, in announcing the probable completion of the Canal in 1913, said:

"The fact is that today there is no statutory law by authority of which the President is maintaining the government of the Zone. Such authority was given in an amendment to the Spooner Act, which expired by the terms of its own limitation some years ago. Since that time the government has continued, under the advice of the Attorney General that, in the absence of action by Congress, there is necessarily an implied authority on the part of the Executive to maintain a government in a territory in which he has to see that the laws are executed. The fact that we have been able thus to get along during the important days of construction without legislation expressly formulating the government of the Zone, or delegating the creation of it to the President, is not a reason for supposing that we may continue the same kind of government after the construction is finished. The implied authority of the President to maintain a civil government in the Zone may be derived from the mandatory direction given him in the original Spooner Act, by which he was commanded to build the Canal; but certainly, now that the Canal is about to be completed and to be put under a permanent management, there ought to be specific statutory authority for its regulation and control and for the government of the Zone, which we hold for the chief and main purpose of operating the Canal."

From this review of the history of the Canal Zone government, the purpose of Congress in enacting the second section of the Canal Act of 1912 must be apparent. There had been no lack of authority in the President after the Spooner Act to build the Canal and employ those who were to do the work. The defect was in the lack of definite authority to create a government, make laws and enforce them, and this had to be spelled out. Congress

deemed it wise, therefore, as it certainly was, to ratify and confirm everything two Presidents had done in carrying on government and making and enforcing law in the Zone. It is in the light of this that the second section must be interpreted. The section confirms "all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone and the construction of the Panama Canal." This means laws needed and enacted to constitute the government, promote sanitation and generally aid the construction of the Canal. It was intended to ratify that as to the validity of which doubt had been expressed. It was only those regulations which rose to the dignity of laws which required ratification. To give the construction to § 2 contended for by appellant would lead to a most absurd result in view of its closing words which ratified and confirmed such laws, rules, regulations and ordinances "*as valid and binding until Congress shall otherwise provide.*" This would be to put innumerable administrative orders and rules adopted in the work, which were necessarily subject to change from time to time as conditions changed and the work progressed, into a strait-jacket, entirely inconsistent with the broad authority of the President granted in the Spooner Act and renewed in § 4 of the same Canal Act of 1912, as follows:

"That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and oper-

ated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone."

In 1914 the President discontinued the Commission, and appointed a Governor. On January 15, 1915, he issued an executive order announcing that the policy of furnishing quarters, fuel and electric current free to all employees was revocable, conferred no vested right upon employees and its future revocation would not be made the basis for increasing compensation. Ex. Order No. 2118—Executive Orders Relating to Panama Canal, Annotated, page 207. Certainly, after this, the appellant can not claim that he and those on whose behalf he sues were misled into accepting employment on the faith of the maintenance of these privileges. Six years thereafter the President made the order here complained of, directing that the charges imposed therein upon employees should be deducted from their pay. The right to deduct from their pay debts owing to the Government by Panama employees was expressly conferred by the eighth section of the Act of March 4, 1907, c. 2918, 34 Stat. 1371. The President's order was therefore valid in all respects.

The Circuit Court of Appeals held that the so-called regulation of 1907 in its form and language was only a declaration of revocable policy and on its face was not a rule capable of being stiffened into binding legislation under § 2 of the Canal Act. We have, however, preferred to put our conclusion on the broader ground that the subject matter of the regulation was not covered by the section.

The motion to dismiss was properly granted by the District Court and its decree was properly affirmed by the Circuit Court of Appeals.

Affirmed.

WOODBRIDGE ET AL., EXECUTORS OF WOODBRIDGE, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 51. Argued October 5, 8, 1923.—Decided November 12, 1923.

1. Any practice of an inventor and applicant for patent through which he, deliberately and without excuse, postpones the beginning of the term of his monopoly, and thus puts off the free public enjoyment of the invention, is an evasion of the patent law and defeats its aim. P. 55.
2. An inventor of projectiles for rifled cannon having obtained allowance of a patent from the Patent Office, procured the papers to be filed in the secret archives on a statement that he wished this for one year only as an aid in obtaining patent rights abroad, and thereafter for nearly ten years deliberately abstained from requesting issuance of his patent in order to postpone the beginning of the patent monopoly until the needs of the Government for the invention should render it of pecuniary value to himself—*Held*, that he forfeited his right to the patent, within the meaning of the special act of Congress authorizing this suit, and therefore compensation could not be recovered from the Government even if it used the invention within the period defined by that statute. Act of March 2, 1901, 31 Stat. 1788. Pp. 56, 59.

55 Ct. Clms. 234, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim preferred under a special act of Congress, for compensation for use by the Government of an invention made by the plaintiffs' decedent.

Mr. Henry P. Doolittle for appellants.

Mr. Harry E. Knight, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck*, *Mr. Assistant Attorney General Lovett* and *Mr. Melville D. Church*, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This suit in the Court of Claims was brought under the authority of a special act of Congress of March 2, 1901, 31 Stat. 1788, by which the claim of William E. Woodbridge, for compensation from the United States for use of his alleged invention relating to projectiles for rifled cannon, for which a patent was ordered issued by the Government, was referred to the Court of Claims to hear and determine, first, whether Woodbridge was the first and original inventor, and, second, to what extent the United States had used it and the amount of compensation which was due in equity and justice therefor, and if it found that Woodbridge was such inventor, to decide the case as if a patent had issued for seventeen years in 1852, the year in which it had been ordered to issue, with the right of appeal as in other causes—"*Provided, however,* That the said court shall first be satisfied that the said Woodbridge did not forfeit, or abandon, his right to a patent, by publication, delay, laches, or otherwise; and that the said patent was wrongly refused to be issued by the Patent Office." The Court of Claims heard the case, made findings of fact and held that the petition must be dismissed on two grounds, first, that Woodbridge had forfeited or abandoned his right to a patent by his delay or laches, and, second, that the United States had not used his invention.

From the findings of fact, it appears that Woodbridge was a man skilled in the science of projectiles and an inventor of genius and experience. In February, 1852, he filed an application for a patent for an invention which he described as consisting of "applying to a projectile to be fired from a rifled gun a rifle-ring, or sabot, in the manner hereinafter described, for the purpose of giving to the projectile the rifle motion." The Patent Office

advised him that the use of sabots or rings of soft metal applied to iron balls was known for either smooth bore or rifled guns, but after discussion allowed him two claims, the first for a smooth ring for a smooth bore cannon, and the second for a ring with exterior projections to fit into the rifled cannon, for the purpose of diminishing windage, and giving the projectile a motion in direction of the axis of the bore.

In a letter of March 23, 1852, Woodbridge wrote the Patent Commissioner, with the claims amended in the form in which the Patent Office had agreed to allow them, and said:

"I was informed, in answer to my inquiry, that upon the issue, or order to issue, of a patent, it may be filed in the secret archives of your office (at the risk of the patentee) for such time as he may desire. I wish to avail myself of this privilege when my patent may issue, in order that my ability to take out a patent in a foreign country may not be affected by the publication of the invention. If it is necessary to specify a particular time during which the patent shall remain in the secret archives, you will please consider one year as the time designated by me."

To this, on April 15, 1852, the Patent Office answered that a patent had been ordered to issue on his application and, in accordance with his request, the papers were filed among the secret archives of the office, subject to his directions as to the time of issuing them. This was done presumably under § 8 of the Act of July 4, 1836, 5 Stat. 121, which contains the following provision:

"And whenever the applicant shall request it, the patent shall take date from the time of the filing of the specification and drawings, not however exceeding six months prior to the actual issuing of the patent; and on like request, and the payment of the duty herein required, by any applicant, his specification and drawings shall be

filed in the secret archives of the office until he shall furnish the model and the patent be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications."

After the filing of the papers in the secret archives before April 15, 1852, nothing was done either by Woodbridge or the Patent Office for nine years and a half, when, on December 31, 1861, Woodbridge wrote to the Commissioner of Patents calling attention to his invention in 1850 and his application for a patent in 1852, the order of the office to issue the patent and the filing of the papers in the secret archives. He said:

"I have allowed it to remain until the present time, it being only lately that any immediate opportunity of rendering it pecuniarily available has occurred."

The fourth finding of the Court of Claims was as follows:

"The reason of said Woodbridge for his delay in requesting issue of the patent allowed him was, as stated by him in communications to the Patent Office, that he thought that course best fitted to enable him to avail himself of the value of the patent, as by procuring delay in the issue of the patent the wants of the Government might demand the invention before the patent should expire, and that as the invention could be made available only by the necessities and action of the Government, he thought the intent of the law that the inventor should have 14 years' exclusive use of his invention could in no other way be so well attained in the case of this particular invention 'as by deferring the issue of the patent to a time when it could be brought into practical use.' "

In the same letter in which Woodbridge asked the issue of the patent he requested that he be permitted to amend his specifications and claims and broaden them so as to cover the use in a rifle of the sabot or ring without the projections to fit in the grooves of the bore. Within five days

the Patent Office replied that the patent would be ordered to issue but that the defects in his specifications could only be cured by a reissue. On January 29th, before a month had elapsed, the Patent Office wrote Woodbridge another letter in answer to his letter of December 31, 1861, in which he was informed that the length of time he had allowed his invention to slumber was a bar to the issue of a patent, that for nearly ten years he had suffered his application to remain locked up not merely beyond the reach of the public but beyond even the cognizance of the examiners and other officers of the department, that meantime many patents had issued for the same invention and yet his only reason for his delay and silence was that he supposed the invention would not prove remunerative until recently. The application was rejected on the ground of abandonment. On April 15, 1862, Woodbridge appealed to the Board of Examiners in Chief and on July 10, 1862, that Board affirmed the action of the examiner. Nothing was done by Woodbridge after this until January 7, 1871, when he appealed to the Commissioner of Patents. A day was set for the hearing. Woodbridge did not get the notice. Another day was set. The Commissioner had to postpone it, and told Woodbridge he would give him another date. Nothing was done by anybody till January, 1879, when on Woodbridge's application the case was heard and the Commissioner affirmed the decision by the subordinate tribunals that the facts amounted to abandonment. Woodbridge appealed to the Supreme Court of the District, which affirmed the Commissioner on February 28, 1880.

The Court of Claims found that Woodbridge was the first and original inventor of the invention involved in the two claims recited above. It also found that the United States had not used the invention. The latter finding as one of fact is attacked on the ground that the question of infringement is a mixed question of law and fact and that

with all the devices used by the United States shown in patents subsequent to Woodbridge, which it is found the United States did use, the question of non-user is really a question of law which should be reviewed here.

The judgment of the Court of Claims was chiefly based on the conclusion of law from the facts found that Woodbridge had forfeited or abandoned his right to a patent by his delay and laches. The court also held that the claims of Woodbridge did not cover the devices the United States used.

The purpose of the clause of the Constitution concerning patents is in terms to promote the progress of science and the useful arts, and the plan adopted by Congress in exercise of the power has been to give one who makes a useful discovery or invention a monopoly in the making, use and vending of it for a limited number of years. Under the Act of February 21, 1793, § 1, 1 Stat. 318, it was for fourteen years. Under the Act of July 4, 1836, § 6, 5 Stat. 117, 119, it was fourteen years, with a right of extension under certain conditions and a proper showing for seven years longer (*idem* § 18, p. 124). Under the Act of March 2, 1861, § 16, 12 Stat. 246, 249, the term was made seventeen years without extension and this has been the term ever since. It was the legislative intention that the term should run from the date of the issue of the patent, and that, at the end of that time, the public might derive from the full specifications required in the application accompanying the patent, knowledge sufficient to enable it freely to make and use the invention. It is true that a patentee is not obliged either to make, use or vend his invention during the period of his monopoly. *Crown Co.* v. *Nye Tool Works*, 261 U. S. 24, 34; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405. Congress relies for the public benefit to be derived from the invention during the monopoly on the natural motive for gain in the patentee to exploit his invention and to make, use

and vend it or its products or to permit others to do so, for profit. The importance in working out the purpose of Congress of keeping the inventor's monopoly within the term for which the patent is granted is thus shown to be capital. Any practice by the inventor and applicant for a patent through which he deliberately and without excuse postpones beyond the date of the actual invention, the beginning of the term of his monopoly, and thus puts off the free public enjoyment of the useful invention, is an evasion of the statute and defeats its benevolent aim.

In this case we have a delay of nine years and a half in securing a patent that might have been had at any time in that period for the asking, and this for the admitted purpose of making the term of the monopoly square with the period when the commercial profit from it would be highest. Not until war or fear of war came was there likely to be a strong demand for rifled cannon and their improvement. Hence, the inventor, having put his order for the issue of a patent into the secret archives of the Patent Office in 1852, sat down and waited until after the Civil War came on in 1861 before seeking to avail himself of the patent, thus postponing the time when the public could freely enjoy it for nearly ten years. Meantime other inventors had been at work in the same field and had obtained patents without knowledge of the situation with respect to Woodbridge's invention. This is not a case where evidence has to be weighed as to the purpose of the inventor. He avows his deliberate intention. This is not a case of abandonment. It is a case of forfeiting the right to a patent by designed delay. The special statute makes it a condition of any jurisdiction of the Court of Claims to render a judgment against the United States that the court shall find that claimant had not forfeited his right to a patent by delay or laches or for other reasons. This necessarily implies that there may be forfeiture by delay or laches,

and this Court has said that there may be such a forfeiture. In *Kendall* v. *Winsor*, 21 How. 322, 329, Mr. Justice Daniel, speaking for the Court, delivered a very clear and forcible opinion on what the inventors who sought patents owed the public. One passage in that opinion is apposite here:

"It is", said the Justice, "the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant with language—such, for instance, as an acquiescence with full knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a wilful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others."

In the case before us, we have the feature last alluded to. Many inventors were at work in the same field and had made advances in the art and the Government had used them. When Woodbridge conceived that the time for him had come to assert his monopoly, he became aware of the fact that in his specifications and claims, as allowed, he had not covered the real advance made by his unconscious competitors, and that was the use in a rifled gun of a ring or sabot without projections to fit into the rifling of the bore which, because of the softness of the metal of the ring under the heat and pressure, would do so without projections; and so, nine and a half years after his patent had been allowed but not issued, he applied for a change of specifications and claims, so that he might cover the patents of these subsequent inventors.

Reference is made to the custom of the Patent Office in 1852 and its permission and acquiescence in the consignment of Woodbridge's specifications and order for is-

sue of his patent to the secret archives, as an excuse and explanation for his course. But this is no justification. By the terms of his letter directing it to be done, he said he wished to apply for foreign patents and that he would not ask delay for more than a year. Moreover, § 8 of the law of 1836, quoted above, wherein is found the only authority for such a proceeding, limits the possible period of the deposit in the secret archives to one year, for the evident purpose of preparing a model. Here the findings show that the model had been filed before the deposit, and also show that he never applied for a foreign patent. These circumstances only emphasize the truth of his avowal of 1862 that he was deliberately delaying the issue of his patent so that its term and monopoly would reach forward to include nearly ten more years of the future and cover a much more commercially lucrative period than if he had obtained his patent when he might and should have requested it. Thus he would have deprived the public of a decade of free use of the patent which the law intended. It is true that, under the special law authorizing this action, Woodbridge's representatives could not recover compensation from the Government except for the period of seventeen years from 1852. But this feature of the special law is immaterial in considering the jurisdictional question whether by his conduct he forfeited his right to his patent. That must be decided on the facts as they were between 1852 and 1862. Had he taken out his patent in 1852, he would have been entitled to a term of fourteen years with a contingent possibility of an extension for seven years more. With the change of the law in 1861, had he succeeded in his effort on the last day of that year, he would have secured a patent for seventeen years from 1862. To state it in another way, his certain term if he had been diligent and not sought to evade the law, would have expired in 1866. Had he succeeded in his illegal plan

and procured a patent in 1862, his term would have ended in 1879. Part of this unconscionable postponement of the end of his monopoly was due to the change of law in 1861, but nearly ten years, as already said, was the result of his deliberate design.

No case cited to us presents exactly these facts, but the general principles upon which this Court has proceeded in cases of abandonment by conduct and its views of the rights of the public and the purpose of the constitutional authority to grant patents and of Congress in its legislative execution of that purpose, set forth in those cases, leave no doubt of the conclusion we must reach. *Pennock* v. *Dialogue,* 2 Pet. 1; *Wyeth* v. *Stone,* 1 Story, 273, 282; *Shaw* v. *Cooper,* 7 Pet. 292; *Kendall* v. *Winsor,* 21 How. 322, 329; *Planing-Machine Co.* v. *Keith,* 101 U. S. 479, 485; *United States Rifle & Cartridge Co.* v. *Whitney Arms Co.,* 118 U. S. 22, 25.

Of course the conclusion that patents have been abandoned by conduct in such cases is reached by inference that the delay and other circumstances indicated an intention to give up effort to secure a patent. The circumstances usually relied on to show abandonment are a rejection of an application for a patent by the Patent Office and unexplained delay in prosecuting appeal from one of the several executive tribunals to another provided in the procedure of obtaining a patent. From these intent to abandon is presumed. It is urged that such authorities have no application because intent to abandon can not be inferred from the delay in this case. That is true; but our conclusion rests not on neglect and intention to give up the patent but on a deliberate and unlawful purpose to postpone the term of the patent the inventor always intended to secure.

The case which comes nearer in its facts to this than any other, and is a case of forfeiture rather than abandonment, is that of *Macbeth-Evans Glass Co.* v. *General*

Electric Co., 246 Fed. 695. There, an inventor of a process for making glass used it in secret for nearly ten years, selling the product. At the end of that time when the secret was betrayed by an employee, the inventor applied for a patent. It was held by the Circuit Court of Appeals of the Sixth Circuit, in a most satisfactory opinion by Judge Warrington, that the policy of the patent law to secure to the public the full benefit of inventions after expiration of the fixed term deemed sufficient reasonably to stimulate invention, would be defeated if an inventor could withhold his invention from the public for an indefinite time for his own profit, and that the right to preserve a monopoly in an invention by keeping it a trade secret and the right to secure its protection under the patent laws were inconsistent and could not both be exercised by an inventor. The gist of the reason for the conclusion there was the same as here, that the purpose and result of the conduct of the inventor were unduly to postpone the time when the public could enjoy the free use of the invention.

Mr. Justice Clifford, in *Bates* v. *Coe*, 98 U. S. 31, when considering the validity of a reissued patent, used these words (p. 46):

"Inventors may, if they can, keep their invention secret; and if they do for any length of time, they do not forfeit their right to apply for a patent, unless another in the meantime has made the invention, and secured by patent the exclusive right to make, use, and vend the patented improvement. Within that rule and subject to that condition, inventors may delay to apply for a patent."

And in *Parks* v. *Booth*, 102 U. S. 96, 105, the same Justice said:

"Unless inventors keep their inventions secret they are required to be vigilant in securing patents for their protection."

These remarks were not necessary to the conclusion in the case he was describing, and those in *Bates* v. *Coe* have given some concern to judges having to consider actual cases of deliberate delay. Chief Justice Alvey of the Court of Appeals of the District said of them (*In re Appeal of Mower,* 15 App. D. C. 144, 152, 153):

"This, doubtless, is a correct general proposition; but like all general propositions, it may have its exceptions under special and particular circumstances, even where the intervening rights of third parties have not been secured by patent.

"The patent laws are founded in a large public policy to promote the progress of science and the useful arts. The public, therefore, is a most material party to, and should be duly considered in, every application for a patent, securing to the individual a monopoly for a limited time, in consideration for the exercise of his genius and skill. But the arts and sciences will certainly not be promoted by giving encouragement to inventors to withhold and conceal their inventions for an indefinite time, or to a time when they may use and apply their inventions to their own exclusive advantage, irrespective of the public benefit, and certainly not if the inventor is allowed to conceal his invention to be brought forward in some after time to thwart and defeat a more diligent and active inventor, who has placed the benefit of his invention within the reach and knowledge of the public."

Judge Warrington, in the *Macbeth-Evans Case, supra,* refers to the same remarks (246 Fed. 705) as follows:

"We therefore cannot think that the rule laid down in *Pennock* v. *Dialogue* and *Kendall* v. *Winsor* was intended to be qualified by the remarks of Mr. Justice Clifford in *Bates* v. *Coe* . . . We are confirmed in this by the reference made in *Bates* v. *Coe* . . . to the decision in *Pennock* v. *Dialogue* and to the effect of the legislation enacted since, and particularly by the view expressed by

the same justice while sitting on the circuit in *Jones* v. *Sewall,* 3 Cliff. 563, 592, 593—Fed. Cas. No. 7,495 where, in distinguishing between the intent to be inferred from experimental practice of an invention and practice for gain, he said:

"'Such an inference (of intention to surrender the invention to the public) is never favored, nor will it in general be sufficient to prove such a defense, unless it appears that the use, exercise, or practice of the invention was somewhat extensive, and for the purpose of gain, evincing an intent on the part of the inventor to secure the exclusive benefits of his invention without applying for the protection of letters patent.'"

We concur in these explanations and qualifications of Mr. Justice Clifford's general remarks in *Bates* v. *Coe,* and for the reasons given. They certainly should not be construed to militate against our conclusion in this case and the reasons upon which it is founded.

Counsel for the appellants relies chiefly on the cases of *Smith* v. *Goodyear Dental Vulcanite Co.,* 93 U. S. 486; *Colgate* v. *Western Union Telegraph Co.,* 6 Fed. Cases, p. 85, and *United States* v. *American Bell Telephone Co.,* 167 U. S. 224, known as the *Berliner Case.* The first two cases have no bearing on this case. In them, the Court found as a fact that the delays of the inventor in prosecuting his claims in the Patent Office after rejection were not due to an intention to abandon but to his necessitous circumstances. In the *Berliner Case* there was also a question of fact but a different one. The Government charged in that case, as it is charged here, that the Telephone Company, the owner of the invention, deliberately delayed proceedings in the Patent Office for thirteen years in order that, when its main Bell patent expired, the patent for the indispensable Berliner device might overlap and continue the monopoly as a whole. A reading of Mr. Justice Brewer's opinion in that case shows that the at-

tention of the Court was chiefly directed to the issue whether as a fact the delay was due to the design of the owner of the invention or to circumstances over which it had no control, including the rules of the Patent Office, the delays of the examiners, and the peculiar situation as to applications for patents in that active field of invention. The Court found this issue against the Government and in favor of the patentee, whose patent the Government was attempting to cancel for this fraud and could only cancel by clear and convincing proof. In the case at bar, the design of the inventor is disclosed by his own avowal, and his plan of non-action was not in accord with the rules of procedure in the Patent Office but was in plain violation of the statutory law.

The conclusion that Woodbridge forfeited his right to a patent by his delay in taking it from 1852 to 1862 makes it unnecessary for us to consider whether he abandoned it by his wholly unexplained delay of nine more years in prosecuting his appeal from the decision of the Board of Examiners, in July, 1862, to the Commissioner of Patents, until January, 1871. It also relieves us from going into the question whether the Government's use of subsequent patents for improvements in adjusting projectiles for firing from cannon embraced the invention of Woodbridge as contained in his specifications and claims allowed in 1852.

The judgment of the Court of Claims dismissing the petition is

Affirmed.

MYERS ET AL., COPARTNERS AS S. A. & H. MYERS, *v.* INTERNATIONAL TRUST COMPANY.

CERTIORARI TO THE SUPERIOR COURT, COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

No. 89. Argued October 18, 1923.—Decided November 12, 1923.

A judgment in bankruptcy confirming a composition over a creditor's objection based on the allegation that the bankrupts had obtained credit by a false statement of their financial condition, is not *res judicata* as to the creditor's cause of action against the bankrupts for the same alleged deceit; but estops the creditor as to the issue of falsity where this was not only raised, but actually decided against him, in the bankruptcy proceedings. *Cromwell* v. *Sac County*, 94 U. S. 351; *Friend* v. *Talcott*, 228 U. S. 27. P. 70.

241 Mass. 509, reversed.

CERTIORARI to a judgment of the Superior Court of Massachusetts, entered on a rescript from the Supreme Judicial Court, and enforcing a verdict, recovered by the present respondent, in a suit against the petitioners for damages for deceit.

Mr. Edward F. McClennen for petitioners.

Mr. John R. Lazenby for respondent.

I. The right of the bank to maintain an action for deceit and misrepresentation was not a provable claim in bankruptcy and hence was not discharged by the confirmation of the composition.

When the International Trust Company made the advances, it had two separate and distinct causes of action: (a) an action of contract founded upon the contractual obligations created by the notes, and (b) an action of tort founded upon the deceit of the Myers in inducing the bank to pay money upon misrepresentations intentionally made.

The Bankruptcy Act recognizes these two distinct causes of action and discharges the debtor from his liability on the contract and denies him the discharge from liability for deceit.

Section 14c provides that the confirmation of a composition discharges debts other than those not affected by a discharge.

Section 14b requires the discharge of the debtor unless he has ". . . (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

Section 17, as amended by Act February 5, 1903, c. 487, § 5, and Act March 2, 1917, c. 153, provides that a discharge releases a bankrupt from his provable debts except such as ". . . (2) are liabilities for obtaining property by false pretenses or false representations . . ."

Section 63 defines "provable debts," and the definition does not include actions of tort for false representations.

The meaning of the word "false" as used in these sections of the Bankruptcy Act is that the statement must be not only untrue, but also untrue with an intention to deceive.

No question is raised as to the instruction to the jury by the trial court defining the word "false."

The Bank proved its claim on the notes in the bankruptcy proceedings. It did not prove its right to recover in tort for deceit and misrepresentation. Such a claim is not provable. *Schall* v. *Camors,* 251 U. S. 239; *Talcott* v. *Friend,* 179 Fed. 676; 228 U. S. 27.

The fact that the Trust Company proved its claim on the contracts, the notes, does not affect this right to maintain this action of fraud. *Standard Sewing Machine Co.* v. *Kattell,* 132 App. Div. 539; *In re Menzin,* 238 Fed. 773; *Zimmern* v. *Blount,* 238 Fed. 740; *In re Groodzinsky,*

248 Fed. 753; *Forsyth* v. *Vehmeyer,* 177 U. S. 177; *Crawford* v. *Burke,* 195 U. S. 176; *Frey* v. *Torrey,* 70 App. Div. 166; 175 N. Y. 501.

The debt is expressly excepted from the operation of the discharge by § 17 (2).

The present case is not one where the plaintiff may treat his cause of action as one in assumpsit, electing whether he will treat the fraud as a quasi-contract and waive the fraud, but it is one where there are two separate and distinct rights which give rise to separate and distinct causes of action. *Crawford* v. *Burke,* 195 U. S. 176; *Tindle* v. *Birkett,* 205 U. S. 183. *Kreitlein* v. *Ferger,* 238 U. S. 21, distinguished.

II. The decision of the United States District Court in bankruptcy confirming the composition was not *res judicata* upon the question of fraud.

Section 12d of the Bankruptcy Act requires the confirmation of a composition, provided the alleged bankrupt has not been guilty of any acts which will bar a discharge, and § 14b (3) refuses the discharge if the bankrupt has obtained money or property on credit upon a materially false statement in writing made to "any person" for the purpose of obtaining credit.

Any creditor may object to the confirmation of the composition irrespective of whether the false statement was made to him or to another creditor. *In re Miller,* 192 Fed. 730; *Talcott* v. *Friend,* 179 Fed. 676; *In re Kretz,* 212 Fed. 784.

The jury has found that the statement was intentionally false within the definition of the federal cases construing the Bankruptcy Act.

The petitioners have argued that the Bank had the option of remaining silent in the bankruptcy court as to the fraud and later avoiding the effect of the discharge by showing that the petitioners' liability was for obtaining property by false representations, or of trying out

the issue of fraud in objecting to the discharge in the bankruptcy court.

This argument is clearly unsound and results from confusing the nature of the Bank's rights. It assumes that the Bank had only one claim and that the assertion of that claim in the bankruptcy court eliminated the right to maintain an action for fraud after the granting of the discharge. Further, it assumes that the Bank had the right to avoid the discharge in a subsequent suit on the notes, on the ground that it was a provable debt and a liability for obtaining property by false pretenses under § 17 (2). The Bank, as stated before, had two rights—contract on the notes and tort for fraud. The first was provable. The second was not. If the Bank had merely the one right which allowed it to go into the bankruptcy court, it had a provable claim which was followed by the discharge, but under the statute the bankruptcy court never had and could not have before it the claim founded on the tort.

Further, the damages in the tort action could not be determined until the loss suffered by reason of the tort was fixed by the dividend received in the bankruptcy proceedings.

There was no such election and waiver as the petitioners argue. *Friend* v. *Talcott*, 228 U. S. 27, 37, 38.

Neither is it a case of one wrong with an election of remedies. *United States* v. *Oregon Lumber Co.*, 260 U. S. 290.

In the present case the proving of the notes was the affirmation of the contract and the bringing of suit in tort was a second affirmation and seeking damages for the injury caused by reason of the fraud. The right to object to the discharge arose out of the right to prove the notes and was entirely incidental thereto.

Nor can the doctrine of estoppel have any application.

The parties in the bankruptcy proceedings are not the same as the parties in this suit. It was the bankrupt

estate against the bankrupt and not one individual creditor against the bankrupt. *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434; *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464. *Bates* v. *Bodie*, 245 U. S. 520, distinguished.

The question at issue is not the same. The sole question in the bankruptcy proceedings was whether the debtor should be discharged from his provable debts, not whether any particular debt was discharged.

The Bankruptcy Act itself brings the two rights out clearly. Section 14b(3) requires that the false statement shall be in writing, but § 17a provides that a discharge shall not release the bankrupt from liability for obtaining money by false representations even though the statement is not in writing.

Friend v. *Talcott*, 228 U. S. 27, is decisive. The facts are almost identical with the facts in the present case. *In re Menzin*, 238 Fed. 773; *Pell* v. *McCabe*, 256 Fed. 512; *In re Groodzinsky*, 248 Fed. 753; Corpus Juris, Bankruptcy, p. 400; Collier, Bankruptcy, 1921 ed., p. 406; Remington, Bankruptcy, 2d ed., p. 2493, § 2750¾; Foster, Federal Practice, 5th ed., vol. II, pp. 2254, 2256.

Mr. Chief Justice Taft delivered the opinion of the Court.

This action was begun in the Superior Court of Massachusetts by the International Trust Company, a bank, against Samuel A. and Harry Myers, brothers and partners, for damages for deceit in that the defendants had obtained credit from the Trust Company by a false statement of their financial condition. The action resulted in a verdict for $14,304.49. The amended answer of the defendants pleaded *res judicata* in the cause by a decree of the United States District Court for Massachusetts in bankruptcy, and on the trial the defendants offered the record therein as evidence of an estoppel by judgment

against the plaintiff as to the fact of falsity. The trial court excluded the record. The case was taken by bill of exceptions to the Supreme Judicial Court, which overruled the exceptions and sent down the rescript and pursuant thereto final judgment was entered on the verdict. The Massachusetts courts held that the bankruptcy proceedings neither were *res judicata* as to the cause nor estopped the plaintiff as to the fact of falsity. The case here turns on the effect of the bankruptcy record, and so presents the federal question whether full faith and credit was given to the judgment of a federal court. *Radford* v. *Myers*, 231 U. S. 725, 730; *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216, 233.

In January, 1917, an involuntary petition in bankruptcy was filed against the Myers brothers. They made an offer of composition. A majority of the creditors accepted the offer. The Referee recommended that it be confirmed. The Myers brothers applied for confirmation. The International Trust Company entered its appearance as a creditor and opposed the confirmation on the ground, among others, that the Myers brothers had obtained loans from the Trust Company by the statement made in writing on the first day of January, 1916, that the accounts receivable amounted to $58,425.06; that the statement was materially false and was made for the purpose of obtaining certain aforesaid sums on credit "said falsity being that the alleged bankrupts concealed and omitted to set forth in said statement the fact that of the said accounts receivable a certain portion in the neighborhood of $20,000, the exact sum being unknown to your petitioner, had been assigned and set over to the Commercial Investment Trust, and, further, that the accounts receivable, as set forth in said statement, did not amount to the sum of $58,425.06". The Referee to whom the objections were referred reported that Myers brothers had made the statement and the Trust Company had relied on

it in making them loans, but that when it was made it was a true statement and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books kept according to the custom of the bankrupts at that time by an experienced and competent bookkeeper, and he found no evidence that the bankrupts or either of them falsely or purposely concealed or omitted to set forth in said statement the amount of the accounts assigned to the Commercial Investment Company and that the objection could not be sustained. The District Judge (245 Fed. 110) confirmed the finding of the Referee. The International Trust Company carried this ruling on appeal to the Circuit Court of Appeals for the First Circuit, and that court (245 Fed. 110, 112) affirmed the order confirming the composition.

The declaration of the Trust Company in this action for deceit has put the case on the falsity of the same statement of January 1, 1916.

The general principles which must govern here are laid down in an oftquoted opinion of Mr. Justice Field in *Cromwell* v. *Sac County*, 94 U. S. 351. In that case suit had been brought upon coupons attached to bonds issued by the county for the erection of a school house, and it was adjudged that the bonds and coupons were invalid in the hands of one not a *bona fide* holder for value before maturity, and as the plaintiff had not shown himself to be such a holder, he could not recover. In a second suit on other coupons from the same bond, he proved that he was a holder for value before maturity and the county sought to defeat the second suit by pleading the judgment in the first as *res judicata*. It was held that the cause was different and that the first judgment was not a bar. Mr. Justice Field said (pp. 352, 353):

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar

or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . .

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action". See also *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1, 50; *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.,* 227 U. S. 434, 440.

Coming now to apply these principles to the case before us, it is very clear that the opposition to the composition in the bankruptcy court was not the same cause of action as the suit for deceit here. That is settled by the decision of this Court in *Friend* v. *Talcott,* 228 U. S. 27, in a case involving similar facts, to be more fully stated. The defense of *res judicata* as to the cause was therefore not established by the judgment confirming the composition.

Counsel for the petitioners, however, urges that in spite of this the bankruptcy record was admissible in evidence. What he contends is that the essential fact found as between the petitioners and respondent in the bankruptcy proceedings and the confirmation of the composition was the truth of, and lack of falsity in, the statement of January 1, 1916, that in the trial of this action for deceit the burden of the Trust Company was to prove the falsity of the statement or fail, and that the Myers brothers were entitled to introduce as evidence conclusively rebutting the Trust Company's evidence of such falsity, the record of the bankruptcy proceedings showing that the question of such falsity in the statement had been adjudged against the Trust Company and in favor of the Myers brothers in a cause to which both were parties and in which the fact of falsity was a relevant and indispensable issue.

In the bankruptcy proceedings after the bankrupts' application was made to confirm the composition, the International Trust Company entered its appearance and filed its specification as it was required to do under General Order XXXII before it could oppose the confirmation and the consequent discharge of the bankrupts. Then followed before the Referee, to whom the issue thus made was referred, what was equivalent to a hearing in equity. This was the beginning of a distinct, separate and new suit. *In re Guilbert,* 154 Fed. 676; *In re Amer,* 228 Fed. 576. This suit between respondent and petitioners was decided by the Referee and the two courts against the respondent and the composition was confirmed because it was found that the statement of January 1, 1916, was true and not false. This is exactly the same issue which arose in the suit for deceit which is before us. Recovery of the judgment under consideration can not be sustained except upon the finding that the statement was false. The respondent, the Trust Com-

pany, can not litigate again that issue in this case, because it is bound by the finding against it in its opposition to the confirmation of the composition. This follows necessarily from the rule in the second class of cases laid down by Mr. Justice Field in the language already quoted.

An adjudication of bankruptcy, or of discharge therefrom, is a judgment *in rem* and is binding on, and *res judicata* as to, all the world, only in respect of the status of the bankrupt, and is not conclusive as to the findings of fact or subsidiary questions of law on which it is based except as between parties to the proceedings or privies thereto. *Gratiot State Bank* v. *Johnson,* 249 U. S. 246, 248; *Manson* v. *Williams,* 213 U. S. 453, 455; *In re Henry Ulfelder Clothing Co.,* 98 Fed. 409, 413; *In re Schick,* 2 Ben. 5—Fed. Cases, No. 12,445. Here the International Trust Company was a real party to the issue and conducted the litigation. While the creditors whom it represented on the question of the discharge were only concluded as to the status of the bankrupt, it was estopped as between itself and the bankrupts in respect of the relevant facts determined in the controversy exactly as if the proceeding in opposition to the composition and discharge had been an ordinary civil suit by it against them.

The respondent however contends, and the Supreme Judicial Court of Massachusetts held, that this case is controlled upon this point, as well as in respect to general defense of *res judicata,* by *Friend* v. *Talcott,* 228 U. S. 27, and must be affirmed on the authority of that case. That was a case like this in which a creditor, having opposed a composition in bankruptcy, was defeated in his effort and brought suit in tort for deceit for damages equal to the balance of his claim after deducting what he had received on his provable claim for goods sold. The deceit alleged in the specification was a false report of

financial condition of the bankrupt made to a commercial agency whose report the opposing creditor relied on. The bankruptcy court held that these facts thus alleged did not bring the case within paragraph (3) of § 14b of the Act of July 1, 1898, c. 541, 30 Stat. 550, as amended by Act of February 5, 1903, c. 487, § 4, 32 Stat. 797, which provided that "the judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has . . . (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." It confirmed the composition. The reasoning of the bankruptcy court was that paragraph (3) required that the materially false statement, to be effective to prevent a discharge, should be made directly to the creditor or his representative whom the debtor intended to deceive and that as the specification only showed a statement made to a commercial agency, it did not aver facts sufficient to constitute a bar to the composition and the bankrupt's discharge.

A year later the creditor began his action for deceit. In addition to the general issue, the defendants and former bankrupts set up the above judgment as *res judicata*. In the District Court the cause was heard on this plea of former adjudication and the plea was sustained. The Circuit Court of Appeals held that the defense of *res judicata* was not sustained and reversed the judgment of the District Court.

This Court held that the causes of action were not the the same, that the first concerned the general discharge of all the creditors under one section, and the second the exception from such general discharge of a particular

creditor under another section and that the defense of former adjudication was bad.

Coming then to the question of estoppel by judgment on the issue of fact as to the deceit, Chief Justice White, speaking for the Court, used this language:

"It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition. On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge, are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition."

The Court thus points out that the issue of material falsity of statement was not an issue of fact in the bankruptcy court, because that court had held that even if the fact of falsity as alleged in the specification of opposition were conceded, it did not prevent the confirmation of the composition and discharge under (3) § 14b of the Bankruptcy Act, because the statement was not made to the creditor or his representative, whereas the right of the creditor to recover in the action in hand was based on an exception to the discharge under the 17th section of the Bankruptcy Act of a liability "for obtaining property by false pretenses or false representations," (Amendment of February 5, 1903, c. 487, § 5, 32 Stat. 798,) without any restriction as to whom the representation should be made. In other words, the exact point upon which the suit for deceit depended, to wit, the falsity of the statement, was not considered and passed on by the bank-

ruptcy court. That court without enquiring as to the truth of the statement held as matter of law that it could not prevent the composition.

Nor does that which follows the above quotation help respondents. It had evidently been argued that the view of the bankruptcy court as to the limitation of (3) § 14b was erroneous and that the issue of deceit was necessarily before it and so in the result was decided. This led the Chief Justice to say (p. 41):

"Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case."

This of course is to be applied to the facts of the case. The question of law whether the statement had to be made to the creditor or his representative only, under (3) § 14b of the Bankruptcy Act, did not arise in the second case at all for, as said above, that involved only the meaning of § 17 which had no such words of limitation. The circumstance that the bankruptcy court may have erroneously declined to decide the question of falsity could not give its action in avoiding decision of it the same conclusive effect as if it had decided it, in a subsequent action between the same parties in which the reason for avoiding it however erroneous did not exist. The Chief Justice continued (p. 42):

"If on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results

that in no view of the case is there merit in the contention as to *res judicata.*"

This was only to say that the issue of falsity in (3) of § 14b, if rightly construed by the bankruptcy court, was not the same as that in § 17.

The distinction between that case and this then is clear. The whole and sole effect of the decision in *Friend* v. *Talcott* was, first, that the judgment confirming the composition and discharge, based on (3) of § 14b, was not the same cause of action as that in the action for deceit based on § 17, and therefore that it did not estop the creditor from obtaining a judgment in the latter suit, and, second, that the issue of the falsity of the statement, while essential to recovery in the second suit for deceit, was not essential to the judgment in bankruptcy as held by the court which rendered the judgment and was in fact not determined by that court. In the case before us, however, we find that the issue of the statement's falsity was the same and was controlling in both suits and that, because it was decided against the Trust Company in the first suit, the decision concludes the issue against the company in the second. It was error, therefore, to exclude from the evidence the record of the bankruptcy judgment on the composition

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

BROWN ET AL. *v.* UNITED STATES.

UNITED STATES *v.* BROWN ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

Nos. 97 and 98. Argued October 19, 1923.—Decided November 12, 1923.

1. Where establishment of a reservoir under the Reclamation Act involved flooding part of a town, the United States had constitutional power to take by condemnation other private land near by, in the only practicable and available place, as a new townsite to which the buildings affected could be moved at the expense of the United States and new lots be provided in full or part satisfaction for those flooded. P. 81.
2. The fact that, as an incident of such a readjustment, there may be some surplus lots of the new townsite which the Government must sell, does not characterize the condemnation as a taking of one man's property for sale to another. P. 82.
3. When the award in condemnation is for the value of the property as of the date of the summons without regard to the damage arising from the owner's inability to sell or lease during the proceedings, and, under the applicable state law, the Government may obtain possession promptly after bringing suit, interest from date of summons to judgment may be allowed on the award, even though the owner remained in possession, cultivating and gathering crops meanwhile. P. 84.
4. While, *semble,* the Act of 1888, in directing federal courts to conform their practice and procedure in condemnation "as near as may be" to that of the State where the property is, does not bind them to follow state statutes allowing interest on the award, interest in this case, at 7%, was properly included, in fixing just compensation. P. 86.

279 Fed. 168, affirmed.

WRITS of error, by both sides, to review a judgment of the District Court in a condemnation case.

Mr. J. H. Peterson, with whom *Mr. T. C. Coffin* was on the brief, for Brown et al.

The United States is without power to condemn land for the purposes of a town site under the circumstances set out in the record.

Under the most liberal definitions, the taking proposed could not be construed to be for a public use.

"It is conceded on all hands that the legislature has not power in any case to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit." Cooley's Const. Lim., 6th ed., p. 651.

The public use necessary cannot be found in the business speculation involved in the transaction. Nichols, Eminent Domain, p. 178.

If there is any other purpose except a desire to salvage a portion of the movable property in the old town site and to reduce the expenditure for a public improvement, it must be found in the solicitude of the Government for the residents of the old town site. This likewise cannot be construed to be a public use, because, in any event, its benefit accrues to a very limited number of people. There would seem to be necessarily some limit beyond which even the Federal Government should not be permitted to go in taking private property under an "exigency created by rapid development." Nichols, Eminent Domain, p. 149; *Chicago & N. W. Ry. Co.* v. *Cicero*, 157 Ill. 48; *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371; *Jones* v. *Tatham*, 20 Pa. St. 398; *Opinion of Justices*, 204 Mass. 607; *Richmond* v. *Carneal*, 129 Va. 388.

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. Chief Justice Taft delivered the opinion of the Court.

These are cross writs of error to a judgment of the District Court of Idaho in a condemnation case. The plaintiffs in error are owners of a tract of 120 acres, which was the object of the suit by the United States. The jury rendered a verdict of $6,250.00 for the plaintiffs, and the court added $328.00 as interest at seven per cent., from the date of the issuing of the summons to that of the judgment. The plaintiffs denied the power of the Congress under the Federal Constitution to condemn the land because not taken for a public use. This entitled them to come to this Court under § 238 of the Judicial Code; and so the United States sued out a cross writ of error to question the legality of including in the judgment the interest item.

Plaintiffs' tract lies just outside the present limits of American Falls in Idaho. The town has 1,500 people and is so situated in the valley of the Snake River that three-fourths of the town, or 640 acres, will be flooded by the waters of a reservoir which the United States proposes to create, for irrigation of its arid public land, by damming the waters of the river.

The Sundry Civil Act of March 4, 1921, c. 161, 41 Stat. 1367, 1403, appropriates $1,735,000 in addition to an unexpended balance for the continuation of the construction and extension of the irrigation system called the Minidoka Project, "with authority in connection with the construction of American Falls Reservoir, to purchase or condemn and to improve suitable land for a new town site to replace the portion of the town of American Falls which will be flooded by the reservoir, and to provide for the removal of buildings to such new site and to plat and to provide for appraisal of lots in such new town site and to exchange and convey such lots in full or part payment for property to be flooded by the reservoir and to sell for not less than the appraised valuation any lots not used for such exchange."

The United States has purchased 410 acres for the new town site and needs 165 acres more of which plaintiffs' tract of 120 acres is part. Negotiations for purchase from the plaintiffs failed, as they demanded $24,000.

The plaintiffs contend that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object can not be regarded as for a public use of the property, and, without this, appropriation can have no constitutional validity. The District Court held that the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site. We concur in this view.

The circumstances of this case are peculiar. An important town stood in the way of a necessary improvement by the United States. Three-quarters of its streets, alleys and parks and of its buildings, public and private, would have to be abandoned. The buildings could not be moved except to the gradually rising ground east of the Snake River. There was a bluff one hundred feet high on the other side of the river. The tract of four hundred and seventy-five acres selected for the new town site was the only practical and available place to which the part of the town to be flooded could be moved so as to be united with the one-quarter of the old town which would be left. American Falls is a large settlement for that sparsely settled country and it was many miles from a town of any size in any direction. It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.

No one would say that a legislative act authorizing a railway company to build a railroad exceeds the constitutional limit by reason of a specific provision that the

company may condemn land not only for the right of way but also additional land adjacent thereto for use as borrow pits in making fills and embankments, or for use as spoil banks or dumps for the earth excavated from tunnels and cuts. Such adjacent land would certainly be devoted to the public use for which the railway was being constructed. If so, then the purchase of a town site on which to put the people and buildings of a town that have to be ousted to make the bed of a reservoir would seem to be equally within the constitutional warrant. The purchase of a site to which the buildings of a town can be moved and salvaged and the dispossessed owners be given lots in exchange for their old ones is a reasonable adaptation of proper means toward the end of the public use to which the reservoir is to be devoted. The transaction is not properly described as the condemnation of the land of one private owner to sell it to another. The incidental fact that, in the substitution and necessary adjustment of the exchanges, a mere residuum of the town-site lots may have to be sold does not change the real nature of what is done, which is that of a mere transfer of the town from one place to another at the expense of the United States. The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill adapted to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situate on streets in another part of the same town or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not to be restored in kind. A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose subordinate agency of government is the munici-

pality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution.

The circumstances of this case are so peculiar that it would not be surprising if no precedent could be found to aid us as an authority. There is one, however, which presents a somewhat close analogy. In *Pitznogle* v. *Western Maryland R. R. Co.*, 119 Md. 673, a railroad company condemned a piece of land for its tracks and yards and in doing so appropriated a private right of way which was the only access of certain other land owners to the public highway. It was held that the railway company could condemn an additional strip of land for a substitute right of way to be furnished to these land owners. In reaching this conclusion the court said:

"The condemnation of a part of this land, here sought to be condemned, for a substitute private road or way is incident to and results from the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution".

Our conclusion is not in conflict with that class of cases with which the Justices of the Supreme Judicial Court of Massachusetts dealt in the *Opinion of Justices*, 204 Mass. 607. It was there proposed that the City of Boston, in building a street through a crowded part of the city, should be given power to condemn lots abutting on both sides of the proposed street with a view to sale of them after the improvement was made, for the promotion of the erection of warehouses, mercantile establishments and other buildings suited to the demands of trade and commerce. The Justices were of opinion that neither the development of the private commerce of the city nor the incidental profit which might enure to the

city out of such a procedure could constitute a public use authorizing condemnation. The distinction between that case and this is that here we find that the removal of the town is a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation.

The remaining question in this case arises on the cross writ of error of the United States by which exception is taken to the court's having included in the judgment interest at seven per cent. on the value of the property, as found by the jury, from the date of the issuing of the summons until the date of the judgment. The land remained in the possession of the owners up to date of the judgment and they cultivated the land meantime and gathered crops therefrom.

The District Court, in directing the jury, followed the law of the State (§ 7415, Compiled Laws of Idaho, 1919; § 5221, Idaho Revised Codes, 1908) in which the land lay and the court was sitting, as follows:

"For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken. . . . No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages."

The Idaho statute has been construed by the Circuit Court of Appeals of the Ninth Circuit to justify the court in adding interest upon the value fixed by the jury from the date of the summons until the judgment. *Weiser Valley Land & Water Co.* v. *Ryan*, 190 Fed. 417, 424. The court said:

"Having such right to compensation at a given time, it would seem that the owner ought to have interest upon

the amount ascertained until paid. In the meanwhile he can claim nothing for added improvements, nor is he entitled to any advance that might affect the value of the property."

Counsel for the United States cite against such a ruling the case of *Shoemaker* v. *United States*, 147 U. S. 282, 321, wherein, in a District of Columbia condemnation, there being no specific statute on the subject, it was held that no interest should be paid to the owner until the taking. The court said:

"It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to condemnation proceedings. But the owner was in receipt of the rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority."

This was followed in *Bauman* v. *Ross*, 167 U. S. 548, 598, in which Mr. Justice Gray, speaking for the Court in reference to the validity of a statute providing for condemnation proceedings in the District of Columbia, said:

"The payment of the damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous. The Constitution does not require the damages to be actually paid at any earlier time; nor is the owner of the land entitled to interest pending the proceedings."

In these cases, the value found was at the time of taking or vesting of title and the presumption indulged was that the valuation included the practical damage arising from the inability to sell or lease after the blight of the

summons to condemn. Where the valuation is as of the date of the summons, however, no such elements can enter into it and the allowance of interest from that time is presumably made to cover injury of this kind to the land owner pending the proceedings. It often happens that in the delays incident to condemnation suits the loss to the owner arising from the delay between the summons and the vesting of title by judgment is a serious one. The interest charge under the Idaho statute has the wholesome effect of stimulating the plaintiff in condemnation to prompt action. Moreover the plaintiff may reduce to a minimum the rents and profits enjoyed by the defendant because, under the Idaho statute, the plaintiff may have a summary preliminary hearing before commissioners to fix probable damages and, by depositing the amount so fixed with the clerk of the court, if the defendant will not accept it, the plaintiff may obtain immediate possession. Within less than a month after bringing suit, he can thus appropriate to himself the rents and profits of the land, and in enjoyment of them can await the final judgment. Idaho Compiled Statutes, 1919, Vol. 2, § 7420; Idaho Revised Codes, 1908, Vol. 2, § 5226.

It is urged, however, that the federal conformity statute as to condemnation suits, which directs federal courts to conform the practice and procedure "as near as may be" to that of the courts of the State where the land is, does not require or authorize the federal courts to allow interest to the property holder except according to the rule laid down in the *Shoemaker Case*, the *Bauman Case*, *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 305, and *United States* v. *Rogers*, 255 U. S. 163, in all of which interest was allowed only from the time of taking or vesting of title; that this is a matter of substance which a conformity statute was not intended to cover, as appears from the language of the opinions in the last two cases. It will be observed, however, that in those two cases the

allowance of interest did conform to the state statutes, and that this was given by the Court as an additional reason for sustaining its conclusion. It is doubtless true that the conformity provision of the Act of 1888 does not bind the federal courts to follow the state statute in the matter of interest. But the disposition of federal courts should be to adopt the local rule if it is a fair one, and, as already indicated, we are not able to say that with the value fixed as of the date of summons, and the opportunity afforded promptly thereafter to take possession, interest allowed from the date of the summons is not a provision making for just compensation. *North Coast R. R. Co.* v. *Aumiller,* 61 Wash. 271, 274. In *United States* v. *Sargent,* 162 Fed. 81, the Government condemned land in Minnesota for a post office. Under the statute of that State the hearing was before three commissioners who were to report the damages sustained on account of the taking. Unless this resulted in payment and settlement, a hearing before a court or jury followed and judgment was entered on that, and possession was given on payment of the judgment, which included costs and interest from the time of filing the commissioners' report. The commissioners' report was filed June 12, 1907, the report was confirmed August 19, 1907, and interest was allowed from June 12th until the date when the damages were paid into the registry of the court. The Circuit Court of Appeals thought the rule a fair one. Speaking by Judge Adams (162 Fed. 84), it said:

"Considerable time may elapse after the commissioners fix the value of the land before it is ultimately paid for. They can only fix it as of the time they act. They can not say what it will be at any definite time in the future. The value may for many reasons change, and the rental value may be materially affected by the tenure of the owner rendered uncertain by possible protracted litigation. Considerations like these doubtless

adopted the Legislature of the state to provide that the amount of the award should bear interest until paid as the best and fairest available method of providing against the possible consequences just suggested. Without holding that the requirement for payment of interest is one of the 'modes of proceeding' which, by section 2 of the act of August 1, 1888, is made compulsory upon the courts of the United States, we are satisfied to conform to it as a palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making 'just compensation' for the land as it stands, at the time of taking. 'The time of taking' under the Minnesota statute, *supra,* is when the payment is made for it. . . . It is better, when possible, to act in harmony rather than in conflict with the established policy of a state."

In the last opinion of this Court on the question of interest in the appropriation of land by the United States, that in *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306, the case of *United States* v. *Sargent* and part of the language above quoted is cited with approval.

Judgment affirmed.

SCHWAB *v.* RICHARDSON, AS TREASURER OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 81. Submitted October 15, 1923.—Decided November 12, 1923.

1. A State may tax the franchise of a corporation of its own creation upon a valuation arrived at by deducting from the actual or market value of its capital stock the value of its tangible property within and without the State, by assigning, as the assessable and taxable value within the State, such part of this difference as is proportional to the business of the corporation transacted there, compared with its outside business, and by levying the tax upon a percentage of this taxable value. P. 91.

2. A tax so assessed, not excessive in amount, on a corporation largely engaged in interstate and foreign commerce, *held*, not objectionable as depriving the corporation of property without due process of law or as regulating or burdening such commerce. *Id.*

188 Cal. 27, affirmed.

ERROR to a judgment of the Supreme Court of California which affirmed a judgment given on the pleadings against the plaintiff in error in his suit to recover a tax, paid under protest.

Mr. W. I. Brobeck and *Mr. Herbert W. Clark* for plaintiff in error.

Mr. U. S. Webb, Attorney General of the State of California, for defendant in error. *Mr. Frank L. Guerena*, Deputy Attorney General, was also on the brief.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The case presents the validity of state taxation on the franchise of the Oceanic Steamship Company, a corporation of the State of California.

There is no dispute of facts. The case turns entirely upon the law applicable to them. The Company was organized to engage under California laws in the transportation of freight and passengers between San Francisco and the Hawaiian Islands and certain foreign countries, and did no intrastate business except the purchase of its fuel and supplies used in its transportation business.

The Company made a written report to the State Board of Equalization as required by the law of the State. The report contained a concise statement and description of every franchise enjoyed by the Company, and other matters required of the Company by the law.

The Board, in pursuance of the law and the constitution of the State, determined the value of the franchise granted by the State to be $120,000 and assessed and levied a tax

thereon of one per cent. which amounted to the sum of $1,200. It is contended that the assessment and levy were and are void under § 1 of Amendment XIV of the Constitution of the United States, because thereby the Board assessed and taxed the Company on property the situs of which was, for more than a year prior to the assessment, and is, without the State of California and beyond the jurisdiction of the State for the purpose of taxation, and attempts to regulate and burden interstate and foreign commerce.

The specification of the means is expressed in the complaint, in addition to the situation of the Company's property, as follows: The Company engaged in business outside of the State. In assessing the franchise of the Company the Board of Equalization did so in pursuance of a fixed rule and general system which necessarily was discriminatory and inequitable. The Board ascertained the actual or market value of the capital stock of the Company, which was constituted of all the value of its property outside of the State, and from such sum deducted the value of the tangible property of the Company in and out of California, and the sum thus ascertained was held by the Board to be the value of the franchise of the Company. The Board then ascertained the percentage and proportion of the total business of the Company transacted in California during the year 1913, and determined the same percentage and proportion of the total franchise value to be the value of the franchise assessable and taxable in California, and the Board thereupon took 15% of that sum, which amounted to $120,000, and on that sum levied a tax at the rate of 1%, amounting to $1,200. And it is alleged that the market value of the shares of capital stock of the Company was at all times materially increased by reason of, and in a great part due to, the ownership and use by the Company of the property outside of the State.

The Company paid the tax under protest. It subsequently assigned its claim to Edwin Schwab, plaintiff in error, who brought this action in the Superior Court of San Francisco against the State, basing the ground of action upon the illegality of the tax.

The answer of the Treasurer to the complaint admitted the assessment of the franchise but denied that the method pursued by the Board of Equalization in the assessment produced a result which was unnecessarily or at all discriminatory, or necessarily or at all inequitable.

Denied that the assessment was or is void under any law or for any reason whatsoever, or that the Board assessed or taxed the Company on any property the situs of which was or is without the State or beyond the jurisdiction of the State for the purpose of assessment.

Alleged that the value of the franchise was the sum fixed by the Board.

Judgment was moved on the pleadings, and plaintiff in error elected to stand on the motion without introducing evidence. The motion was denied and judgment rendered against him. It was affirmed by the Supreme Court. 188 Cal. 27.

Three contentions are made against the assessment and levy. (1) They deprive the Company of its property without due process of law. (2) They are an attempt to regulate interstate and foreign commerce. (3) They are burdens upon interstate commerce.

The argument is that they have such effect because they are "based on the value of property outside of California and on interstate and foreign commerce engaged in, so that the amount of" them "grows in proportion to the growth of such property and commerce."

The basis of the contention is not a new one in this Court. It is not always easy to answer and has involved difference of opinion. Any property of a corporation engaged in interstate commerce may be said to take on

value from such commerce and a tax on the property be increased as the commerce increases. The cases, however, have been careful to distinguish when such effect produces illegality and when it does not.

They have been careful to declare the immunity of interstate commerce from state taxation, but as careful to declare the power of a State to tax values within its borders though they may get enhancement from the exercise of rights outside of those borders. How intimate and direct such rights must be cannot be pronounced in formula. A State may not burden or interfere with interstate commerce or tax property outside of its borders, yet, on the other hand, it has a definite sphere of government which must not be curtailed. Certainly it is not restricted to property taxation, nor to any particular form of excises.

The exertion of the power of a State in taxation has been considered in many cases. A review of them we do not think is necessary. Their pertinence and value are not insistent. The present case is more single. Its instance—the taxation exercised—is upon intangible property. The power of a State over that has been declared many times and has many illustrations. The case is, therefore, free from the perplexity of a consideration of situs which may beset tangible property. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194. It is strictly a franchise tax laid on the Company because it derives its existence—its right to be—from the State.

This is the field within which this case lies and we are not concerned with those which reach beyond that field. To this we confine ourselves. The State has taxed the right which it granted, and which it was competent to tax. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305. *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688; *Kansas City, etc., Ry. Co.* v. *Botkin*, 240 U. S. 227; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325. And

it has been recognized that its—the franchise's—value may be constituted of its employment in interstate commerce, and have measurement in the property which is its instrumentality. *Kansas City, etc. Ry. Co.* v. *Botkin, supra; St. Louis-San Francisco Ry. Co.* v. *Middlekamp,* 256 U. S. 226.

Plaintiff in error resists these cases, yet concedes the power of the State to tax the franchise—a "right of its own creation," and concedes that neither the constitutional provisions nor the statute under which the tax was levied "are on their face obnoxious to the commerce or due process clause of the Federal Constitution." That effect is worked, it is the contention, emphasized by repetition, because the tax is based in whole or in substantial part on the value of the property outside of California, or on interstate or foreign commerce engaged in, so that the amount of it grows in proportion to the growth of such property or commerce.

The contention and its basis are in antagonism to the cases cited and their authority. A repetition of their reasoning is unnecessary. They establish that the method pursued by the Board was not illegally oppressive to interstate commerce or beyond the jurisdictional power of the State. We agree with the Supreme Court that it was admitted by the motion for judgment on the pleadings, without introducing evidence, that the tax was not excessive and that if the State had jurisdiction the imposition of the tax was a proper exercise of it.

Judgment affirmed.

UNITED STATES *v.* SLAYMAKER.

APPEAL FROM THE COURT OF CLAIMS.

No. 87. Argued October 18, 1923.—Decided November 12, 1923.

The provision of the Act of August 29, 1916, that when any member of the Naval Reserve Force severs his connection with "the service," without compulsion on part of the Government, before the expiration of his term of enrollment, the amount credited to him as a "gratuity" for the purchase of a uniform shall be deducted from any money that may be, or may become, due him,—was not intended to apply where an officer of that force left it through being commissioned as an officer of the regular Navy. P. 95.

57 Ct. Clms. 294, affirmed.

APPEAL by the United States from a judgment of the Court of Claims awarding recovery of an amount deducted from the pay of a naval officer.

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck* and *Mr. J. A. Fowler,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Slaymaker, upon his enrollment during the War with Germany, as an officer of the Naval Reserve Force, was paid the sum of $150, as a gratuity for the purchase of a uniform. He was subsequently commissioned as an officer of the regular Navy and that sum was checked against his account and deducted from his pay as such officer. This action is brought to recover that amount.

The Court of Claims gave judgment for Slaymaker, following the ruling, it said, of *Price* v. *United States,* 55

Ct. Clms. 499. To review and reverse its action the Government (there is convenience in so designating the United States) prosecutes this appeal.

The difference between it and the court, and the latter's decision, turns upon an act of Congress passed August 29, 1916, 39 Stat. 589. The act provides that "Members of the Naval Reserve Force shall, upon first reporting for active service for training during each period of enrollment, be credited with a uniform gratuity of $50 for officers and $30 for men.

"Upon reporting for active service in time of war or national emergency the uniform gratuity shall be $150 for officers and $60 for men . . . *Provided*, That should any member of the Naval Reserve Force sever his connection with the service without compulsion on part of the Government before the expiration of his term of enrollment, the amount so credited shall be deducted from any money that may be or may become due him."

We are confronted at the outset with the word "service" and its definition, in the provision "should any member of the Naval Reserve Force sever his connection with the *service*." (Italics ours.) The word "service" is an ambiguous one. It has many senses. In the first paragraph of the act of Congress it has a limited and immediately understood meaning. It has manifestly a larger meaning in the second paragraph, but how much larger is open to dispute—is disputed in this case. Does it mean the Naval Service in the most comprehensive sense of that designation, or the branches or departments of that service, or more narrowly, the functions in those branches or departments? We are inclined to pronounce for the most comprehensive sense, though we feel the strength of the considerations which urge against it.

The allowance is called a "gratuity", but it has useful design. It is intended to attract ability to the work and purposes of the Government. It is a reward and accorded

necessarily at the enrollment of the ability which continued in utility upon whatever objects or for whatever purposes exerted. It grew the greater as it was exercised in experience, and we cannot ascribe to Congress the intention to visit with the same consequence—penalty, we may say—a continuation of service having such result as a cessation of service. There was prompting and inducement to the reverse—prompting and inducement to the policy and practice of giving assurance to officers and men that the promotions they deserved and received would not be regarded as of no benefit to the Government—no more benefit than though they—officers and men—were disconnected from Government.

The Government contests this construction and the judgment of the Court of Claims. Its contention is that Slaymaker's resignation from the Naval Reserve Force was a severance of his connection "with the service" within the meaning of the Act of August 29, 1916, *supra*, and that it was "without compulsion on part of the Government", it being not only voluntary but under the admonition that the gratuity that had been granted him would have to be refunded, since he was "leaving the Reserve Force of his own volition and not by compulsion on the part of the Navy Department".

If the contention were relevant under our construction of the act we should be reluctant to hold that his action was voluntary and incurred the return of the gratuity.

July 1, 1918 (40 Stat. 711) Congress passed an act containing the following provision: "That no part of the clothing gratuity credited to members of the Naval Reserve Force shall be deducted from their accounts where said members accept or have accepted temporary appointments in the Navy in time of war or other national emergency."

This act was passed after the deduction from Slaymaker's pay. The Court of Claims considered the act as

a declaration of the meaning of the Act of August 29, 1916. The court strongly supports its holding. We, however, may rest our decision on the meaning we have assigned to the Act of August 29, 1916.

Judgment affirmed.

NEW ORLEANS LAND COMPANY *v.* BROTT ET AL.

BROTT ET AL. *v.* NEW ORLEANS LAND COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Nos. 64 and 86. Argued October 10, 11, 1923.—Decided November 12, 1923.

1. The act of state officials in issuing a patent, under a state statute empowering them generally to convey such land as passed to the State under a federal swamp land act, is not the exercise of an "authority" under the State, within the meaning of that term in the statute governing writs of error from this Court (September 6, 1916, § 2, 39 Stat. 726,) if the specific lands in the patent, by reason of a prior Spanish grant and a treaty and laws of the United States, were not included in the swamp land grant. P. 98.
2. The claim that a decision of a state court erred in sustaining a Spanish grant over the objections that it was not valid originally and was not confirmed as required by act of Congress,—*held*, not ground for a writ of error under the Act of September 6, 1916, *supra*. P. 99.

Writs of error to review 151 La. 134, dismissed.

Cross writs of error to a judgment of the Supreme Court of Louisiana in a petitory action for land.

Mr. Charles Louque for New Orleans Land Company.

Mr. William Winans Wall, with whom *Mr. Charles Schneidau* was on the brief, for Brott et al.

Mr. Justice Holmes delivered the opinion of the Court.

This is a petitory action for land in New Orleans brought by the Brotts against the New Orleans Land Company. Judgment was given for the Brotts except as to one parcel which was adjudged to belong to the defendant. The defendant brings a writ of error and the Brotts a cross writ. The ground of the judgment was that the State acquired title to the land under the Swamp Land Act of March 2, 1849, c. 87; 9 Stat. 352, and conveyed it to the plaintiffs' predecessors, except that the parcel awarded to the defendant was held to have been excluded from the Swamp Land grant to the State because before the territory was transferred by France to the United States it had been conveyed to private persons by a complete grant.

The New Orleans Land Company contends that at the time of the Swamp Land Act all the land in controversy was in private hands and therefore did not pass to the State; the statute providing that the Secretary of the Treasury shall approve the list of swamp lands directed to be made out "so far as they are not claimed or held by individuals," and the list having been approved "subject to any valid legal rights." It asks this Court to take jurisdiction on the ground that there is drawn in question the validity of an authority exercised under a state law, that is, the issue of the patent, on the ground that it was repugnant to the Treaty of 1803 with France, 8 Stat. 202, and the laws of the United States, and that the decision upheld the validity of the state patent. It also sets up a prior purchase under a decree of the Circuit Court of the United States, but that contention is disposed of by *New Orleans Land Co.* v. *Leader Realty Co.*, 255 U. S. 266. The Brotts rely upon alleged errors as to the grants before the treaty and in recognizing a title under them, even if it existed, when the alleged owner had not had it confirmed as required by the Act of March 2, 1805, c. 26, § 4; 2 Stat. 324, 326, and later acts.

The defendant, the Land Company, to make out its case would have to maintain that notwithstanding the unquestionable validity of the Acts of 1805 and later, requiring outstanding titles to be established or registered after Louisiana was acquired by the United States, *Botiller* v. *Dominguez,* 130 U. S. 238, and notwithstanding the failure of its predecessor in title to comply with the requirement, the land did not pass to the State under the Swamp Land grant if at that time there was any outstanding claim even though the claim turned out to be void. Whatever may be thought of the proposition we cannot deal with it now. No statute of Louisiana has been called to our attention that purports to identify and authorize a conveyance of these particular lands. See La. Stats., March 14, 1855, No. 247; March 16, 1870, No. 38; May 31, 1871, No. 104; Rev. Stats. 1870, § 2920. The validity of no statute has been called in question. The conveyances under which the Brotts claim were authorized by state law only if the lands concerned were part of the Swamp Land grant to Louisiana. The general authority to convey such lands is not attacked, but only the specific patent. If by any chance or hiatus the present lands were not embraced the officials who undertook to convey them were not exercising an authority under the State within the rather narrow meaning that necessarily has been given to the phrase in the statute authorizing writs of error. *United States* v. *Lynch,* 137 U. S. 280. *Cook County* v. *Calumet & Chicago Canal & Dock Co.,* 138 U. S. 635. *French* v. *Taylor,* 199 U. S. 274, 277. See *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445, 451. *Dana* v. *Dana,* 250 U. S. 220. Act of September 6, 1916, c. 448, § 2; 39 Stat. 726. It follows that the New Orleans Land Company's writ of error must be dismissed.

The cross writ taken out by the Brotts also must be dismissed. There very well may have been ground for a writ of certiorari but there is no suggestion that would

warrant a writ of error under the amendment of § 237 of the Judicial Code by the Act of September 6, 1916, c. 448, just cited. The Supreme Court of the State may have unduly limited the Act of Congress of March 2, 1805, but did not dispute its binding effect.

Writs of error dismissed.

HEYER, DOING BUSINESS AS T. A. HEYER DUPLICATOR COMPANY, *v.* DUPLICATOR MANUFACTURING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 75. Argued October 15, 16, 1923.—Decided November 12, 1923.

The sale, by the patentee, of a costly and durable copying machine dependent for its operation on bands of gelatine, which are attached to spools and which cost little and are quickly used up, implies a right in the purchaser to replace such bands as they wear out, without further consent of the seller; and their manufacture and sale for that purpose by another is therefore not an infringement, though the band when used in the combination is covered by the patent. *Wilson* v. *Simpson,* 9 How. 109. P. 101.
284 Fed. 242, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of the District Court and directed one for the plaintiff, the present respondent, in a suit for infringement of a patent.

Mr. Samuel Walker Banning, with whom *Mr. Thomas A. Banning* was on the brief, for petitioner.

Mr. George L. Wilkinson, with whom *Mr. Henry M. Huxley* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the respondent against the petitioner alleging the infringement of a patent. The District Court dismissed the bill, but the Circuit Court of Appeals gave the respondent a decree, one Judge dissenting upon the main point. 284 Fed. 242. The respondent owns a patent for improvements in multiple copying machines, one element of which is a band of gelatine to which is transferred the print to be multiplied and which yields copies up to about a hundred. This band is attached to a spool or spindle which fits into the machine.[1] Anyone may make and sell the gelatine composition but the ground of recovery was that the defendant made and sold bands of sizes fitted for use in the plaintiff's machine and attached them to spindles, with intent that they should be so used. The main question is whether purchasers of these machines have a right to replace the gelatine bands from any source that they choose. If they have that right the defendant in selling to them does no wrong. It is assumed for the purposes of argument that the claim is valid and covers the band when used in this combination, since otherwise there would be nothing to discuss.

Since *Wilson* v. *Simpson*, 9 How. 109, 123, it has been the established law that a patentee has not "a more equitable right to force the disuse of the machine entirely, on account of the inoperativeness of a part of it, than the purchaser has to repair, who has, in the whole of it, a right of use." The owner when he bought one of these machines had a right to suppose that he was free to main-

[1] The claim relied upon is "42. In a multiple copying machine, the combination with a machine frame having on one side thereof a journal bearing and on the opposite side a chuck, of a duplicating band, and a spool on which said duplicating band is wound, said spool having at each end a squared chuck-engaging member and a cylindrical bearing member, whereby said spool is interchangeable end for end between said chuck and journal bearing, substantially as described."

tain it in use, without the further consent of the seller, for more than the sixty days in which the present gelatine might be used up. The machine lasts indefinitely, the bands are exhausted after a limited use and manifestly must be replaced. 9 How. 126. The machine is costly, the bands are a cheap and common article of commerce. In *Wilson* v. *Simpson*, the purchaser was held free to replace the cutter knives that were the ultimate tool of the invention. The present case seems to us stronger in favor of the defendant. The gelatine probably has to be replaced at least as frequently as the cutter knives and would seem to be less distinctively appropriated to the machine. In *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, (No. 2), 213 U. S. 325, the question was not of a right to substitute worn out parts but of a right to use new discs in a talking machine. The authority of *Wilson* v. *Simpson* and the cases that have followed it was fully recognized and must be recognized here. We have only to establish the construction of a bargain on principles of common sense applied to the specific facts. We cannot doubt what the fair interpretation is and it would not be affected even if every purchaser knew that the vendor was prepared to furnish new bands.

Inasmuch as after the present bill had been dismissed it was reinstated on condition that the plaintiff be limited for recovery of profits or damages to the period after the reinstatement and as the evidence is that the only spools used since that date came from the plaintiff we think it unnecessary to make any order touching the spools.

Decree reversed.

Syllabus.

DES MOINES NATIONAL BANK *v.* FAIRWEATHER, MAYOR; ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 17. Argued October 3, 1923.—Decided November 12, 1923.

1. National banks, their property, or the shares of their capital stock, cannot be taxed by the States otherwise than in conformity with the terms and restrictions imposed by Congress in assenting to such taxation. P. 106.
2. Under § 5219, Rev. Stats., (prior to the amendment of March 4, 1923,) national banks and their property were free from state taxation, except on their real property and on shares held by them in other national banks; and all shares in such banks were taxable to their owners, the stockholders, subject to the restrictions that they be not taxed higher than other moneyed capital, employed in competition with such banks, and that the taxing of shares of nonresidents of the State be at the place of the bank's location. P. 107.
3. Where under the state law the shares in a national bank are assessed to the shareholders, and the property of the bank, other than real estate, is expressly exempt, valuation of the shares by the capital, surplus, and undivided earnings, less the real estate, and requiring the bank, primarily, to pay the tax on the shares on behalf of the shareholders, (while allowing it ample means of reimbursement through a lien on the shares,) do not make the tax on the shares in effect a tax on the bank's property, in violation of § 5219, *supra*. P. 111.
4. In assessing shares in a national bank for taxation to the shareholders, no deduction need be made on account of securities of the United States, exempt from state taxation, which are part of the assets of the bank by which the value of the shares is measured, since the shares are property of the shareholders, distinct from the corporate assets. P. 112. *Bank of California* v. *Richardson*, 248 U. S. 476, distinguished.
5. The restriction that taxation of national bank shares "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" of the State, (Rev. Stats., § 5219,) is to prevent discrimination against national banks in favor of state institutions or individuals engaged in similar business or

investments, and applies to rules of valuation as well as to tax percentages. P. 116.

6. This restriction, however, is not violated when the State, perforce, deducts tax-exempt securities of the United States in assessing capital employed in private banking, while taxing (as the act of Congress allows) the value of the shares of national banks without allowance for such tax-exempt securities owned by such banks. *Id.*

191 Iowa, 1240, affirmed.

ERROR to a judgment of the Supreme Court of Iowa sustaining an assessment upon shares of the plaintiff in error Bank, in proceedings by way of appeal from the action of a board of equalization.

Mr. J. G. Gamble, with whom *Mr. R. L. Read* was on the brief, for plaintiff in error.

Mr. Ben J. Gibson, Attorney General of the State of Iowa, and *Mr. John J. Halloran,* with whom *Mr. Maxwell A. O'Brien* and *Mr. George F. Henry* were on the brief, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was a proceeding begun by a national bank in Iowa to secure a reduction in an assessment of the shares of its capital stock for taxing purposes, made in 1919.

The proceeding was in the nature of an appeal from the action of a board of equalization, and ultimately reached the Supreme Court of the State. The bank objected that the board had proceeded on a mistaken construction of the state statute respecting such assessments and that the statute, as construed and applied by the board, was invalid in that it was in conflict with the state constitution and with laws of the United States. The objections were overruled and the assessment upheld. 191 Iowa, 1240. The bank then sued out this writ of error.

The facts may be shortly stated. No assessment was made against the bank, save of its real property. The shares of its capital stock were assessed to their several owners, the stockholders. The aggregate of the bank's capital, surplus and undivided earnings, was taken as the value of the shares, and from this the amount actually invested in real property was deducted. A proportionate part of the remaining sum was attributed to each share. Among the bank's assets were various securities of the United States, concededly exempted from state taxation by laws of the United States. There was also some stock in a federal reserve bank, claimed to be likewise exempted. The bank sought to have these securities and this stock excluded in making the assessment; that is, to have their value deducted from the total of the capital, surplus and undivided earnings. The board declined to make the deduction, and pursued a like course in assessing shares in corporate state banks. Among the bank's competitors were some banks conducted by individuals,—private banking being admissible in that State. In assessing the moneyed capital employed by these private bankers in their banking business, the board excluded so much thereof as was invested in non-taxable securities of the United States. Twenty per cent. of each of the assessments here described, whether of bank shares or money employed in private banking, was set down or listed as the taxable value, as distinguished from the real value. The tax levy was to be at a uniform rate on such taxable value.

We are asked to go into the proper construction of the state statute and its validity under the state constitution. But these are questions of local law, the decision of which by the Supreme Court of the State is controlling. *First National Bank of Garnett* v. *Ayers,* 160 U. S. 660, 664; *Merchants' and Manufacturers' National Bank* v. *Pennsylvania,* 167 U. S. 461; *Lindsley* v. *Natural Car-*

bonic Gas Co., 220 U. S. 61, 73; *Price* v. *Illinois*, 238 U. S. 446, 451.

The only contentions made by the bank which we can consider are, first, that the state statute in substance commands an assessment of the property of the bank, rather than the shares of the stockholders, contrary to the terms of § 5219 of the Revised Statutes of the United States; secondly, that the statute, even if commanding an assessment of the shares of the stockholders, subjects securities of the United States and stock in a federal reserve bank to state taxation in disregard of exemptions arising out of laws of the United States, and, thirdly, that, if the assessment be of the shares, the statute subjects them to a higher rate of taxation than is laid on other moneyed capital of individual citizens,—meaning the private bankers,—and thereby violates a restriction imposed by § 5219 of the Revised Statutes of the United States.

It is settled that the relation of the national banks to the United States and the purposes intended to be subserved by their creation are such that there can be no taxation, by or under state authority, of the banks, their property or the shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation. *People* v. *Weaver*, 100 U. S. 539, 543; *Rosenblatt* v. *Johnston*, 104 U. S. 462; *Mercantile National Bank* v. *New York*, 121 U. S. 138, 154; *Talbott* v. *Silver Bow County*, 139 U. S. 438, 440; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 669; *First National Bank of Gulfport* v. *Adams*, 258 U. S. 362.

The congressional assent and the terms and restrictions accompanying it as existing at the time of this assessment are found in Rev. Stats., § 5219, which reads as follows[1]:

[1] Several important changes in § 5219 were made by an amendatory Act of March 4, 1923, c. 267, 42 Stat. 1499, but they have no bearing on this case.

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

This section shows, and the decisions under it hold, that what Congress intended was that national banks and their property should be free from taxation under state authority, other than taxes on their real property and on shares held by them in other national banks; and that all shares in such banks should be taxable to their owners, the stockholders, much as other personal property is taxable, but subject to the restriction that the shares be not taxed higher than other taxable moneyed capital employed in competition with such banks, and to the further restriction that the taxing of the shares of non-residents of the State be at the place where the bank is located. *People* v. *Commissioners,* 4 Wall. 244; *Bank of Redemption* v. *Boston,* 125 U. S. 60, 69; *Mercantile National Bank* v. *New York, supra; Owensboro National Bank* v. *Owensboro, supra; Bank of California* v. *Richardson,* 248 U. S. 476; *First National Bank of Gulfport* v. *Adams, supra.*

With this understanding of the terms and restrictions of the congressional assent we proceed to an examination

of the state statute and the particulars in which it is said to be in conflict with them and with tax-exempting laws of the United States. The main provisions of the statute are found in §§ 1310, 1322, 1322–1a and 1325 of the Code of Iowa,[2] which read as follows:

"Sec. 1310. . . . All moneyed capital within the meaning of section fifty-two hundred nineteen of the revised statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and if a corporation at its principal place of business, at the same rate as state, savings, national bank and loan and trust company stock is taxed, in the same taxing district, and at the actual value of the moneyed capital so invested. The person or corporation using moneyed capital in competition with bank capital shall furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used."

"Sec. 1322. Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred twenty-one of the supplement to the code 1907, which shall also show separately the amount of

[2] The reference is to the Code as amended April 6, 1911, Laws 34th General Assembly, p. 45,—the amendments being shown in the supplement of 1913.

the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interest, if any,) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. A refusal to furnish the assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars."

"Sec. 1322–1a. For the purpose of placing the taxation of bank and loan and trust company stock and moneyed capital as nearly as possible upon a taxable value relatively equal to the taxable value at which other property is now actually assessed throughout the state as compared with the actual value thereof, it is hereby provided that state, savings and national bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent. of the actual value thereof, determined as herein provided, which twenty per cent. of the actual value shall be taken and considered as the taxable value and shall be taxed as other property in such taxing district."

"Sec. 1325. The corporations described in the preceding sections shall be liable for the payment of the taxes assessed to the stockholders of such corporations, and such tax shall be payable by the corporation in the same manner and under the same penalties as in case of taxes

due from an individual taxpayer, and may be collected in the same manner as other taxes, or by action in the name of the county. Such corporations may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If the unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same, to be made by the sheriff at the principal office of such corporation in this state, after giving the stockholders thirty days' notice of the amount of such tax and the time and place of sale, such notices to be by registered letter addressed to the stockholder at his post-office address, as the same appears upon the books of the company, or is known by its secretary."

Section 1321 referred to in § 1322 relates to the assessment of capital employed in private banking. For present purposes it may be described as requiring the banker to submit to the assessor a sworn statement of the assets and liabilities of his bank with a particular description of such of the assets as are exempt from taxation, and as directing an assessment based on the aggregate value of moneys and credits less deposits, of bonds and stocks less such as are otherwise taxed in the State and of the other property pertaining to the business, but omitting the real estate, which is to be specially assessed as other real estate. The section does not purport to create any exemption or to do more in that regard than possibly to imply that exemptions otherwise created are to be respected. In practice the assessing officers when assessing the capital of private banks do deduct so much thereof as is invested in tax-exempt securities of the United States, but they do this because they regard it as necessary under the tax-exempting laws of the United States.

As construed by the Supreme Court of the State, the statute as a whole contemplates, and § 1322 requires, that

the shares be assessed to the stockholders as their property; and as illustrating that the statute makes a clear distinction between the shares and the property of the bank, the court points to the provision which requires that the real estate be assessed against the bank and to the succeeding provision which declares that "the property of such corporation shall not be otherwise assessed." This, without more, seems completely to refute the contention that what the statute really directs is an assessment of the bank's property instead of the stockholders' shares. The only argument advanced in support of the contention is drawn from the fact that the capital, surplus and undivided earnings of the bank are made the measure of the value of the shares (see *First National Bank of Remsen* v. *Hayes*, 186 Iowa, 892, 900), and from the fact that the bank is required primarily to pay the tax on the shares. In our opinion neither fact gives color to the contention.

The value of the shares must depend chiefly on the capital, surplus and undivided earnings of the bank. These are the substantial elements and are susceptible of ready ascertainment. Other possible elements are of relatively small weight and difficult of estimation. That controlling consideration is given to the former and none to the latter may result in an under-valuation, but it does not make the assessment any the less an assessment of the shares. Besides, it hardly lies with the stockholders or the bank to object that the assessment is too low. *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, 549.

While the bank is required primarily to pay the tax on the shares, the statute (§ 1325) shows that the payment is to be on behalf of the stockholders and that the bank is accorded ample means of enforcing reimbursement from them. It is on the stockholders that the burden ultimately rests. This mode of collecting through the bank the tax against the stockholders has been widely

[illegible]pted and this court has pronounced it not inconsistent [illegible]e terms of the congressional assent. *National Bank* v. *Commonwealth,* 9 Wall. 353, 361; *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440, 444; *Covington* v. *First National Bank,* 198 U. S. 100, 111–112; *First National Bank of Gulfport* v. *Adams, supra.*

The next contention—that the statute subjects securities of the United States to taxation contrary to exempting laws of the United States in that it requires that the assessment be based on the aggregate of the capital, surplus and undivided earnings without any deduction or allowance on account of the investment in such securities—confuses the shares, which are the property of the stockholders, with the corporate assets, which are the property of the bank. It is quite true that the States may not tax such securities, but equally true that they may tax the shares in a corporation to their owners, the stockholders, although the corporate assets consist largely of such securities, and that in assessing the shares it is not necessary to deduct what is invested in the securities. The difference turns on the distinction between the corporate assets and the shares,—the one belonging to the corporation as an artificial entity and the other to the stockholders. As respects national banks, the rule is the same as with corporations in general. The subject was extensively considered by this court in *Van Allen* v. *The Assessors,* 3 Wall. 573, which involved the power of a State to tax stockholders in national banks on their shares without making any deduction on account of tax-exempt bonds of the United States in which the capital of the banks was chiefly invested. In sustaining the power, the court said, p. 583:

"The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the pur-

poses for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it."

Then, after noticing the use made of the term "shares" in other parts of the act, the court added, p. 588:

"In all these instances, it is manifest that the term as used means the entire interest of the shareholder; and it would be singular, if in the use of the term in the connection of State taxation, Congress intended a totally different meaning, without any indication of such intent.

"This is an answer to the argument that the *term*, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the State assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to

have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction.

"Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization."

That ruling often has been reaffirmed, but never qualified, and is now settled law in this court. *People* v. *Commissioners,* 4 Wall. 244; *National Bank* v. *Commonwealth, supra,* p. 359; *Palmer* v. *McMahon,* 133 U. S. 660, 666; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146; *New Orleans* v. *Citizens' Bank,* 167 U. S. 371, 402; *Owensboro National Bank* v. *Owensboro, supra,* p. 681; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 518. The latest application of the ruling was at the last term in *People's National Bank of Kingfisher* v. *Board of Equalization,* 260 U. S. 702, where a decision of the Supreme Court of Oklahoma, 79 Okla. 312, which had followed *Van Allen* v. *The Assessors,* was affirmed "upon the authority of" that case and *National Bank* v. *Commonwealth.*

Counsel for the bank regard the case of *Bank of California* v. *Richardson,* 248 U. S. 476, as qualifying *Van Allen* v. *The Assessors* and other cases which reaffirmed and applied its ruling. But the case is not fairly open to that interpretation. Some expressions are found in the opinion which, if taken literally and alone, seem to treat the stockholders and the bank as one for taxing purposes; but the opinion as a whole and the ultimate decision demonstrate that these expressions fairly cannot be taken in that way and that there was no purpose to qualify the ruling so often announced and applied in earlier cases. That case was exceptional in its facts. A national bank owning shares in two other banks, one national and the

other state (see § 5154, Rev. Stats.), was taxed on those shares. Its stockholders were also taxed on their shares in it,—their shares being taxed on a valuation which took into account all the assets of the bank, other than real estate, including its shares in the other banks. The bank objected to being taxed on its shares in the state bank and also to its stockholders being taxed on a valuation of their shares based in part on its shares in the other banks,—the ground of each objection being that the tax was not in accord with the terms and spirit of the congressional assent. The decision shortly stated was as follows: 1. The bank was wrongly taxed on its shares in the state bank; but those shares were rightly taken into account in valuing the shares of the stockholders. 2. The bank was rightly taxed on its shares in the other national bank, for the reasons given in *Bank of Redemption* v. *Boston,* 125 U. S. 60, 69–70. 3. The shares in the other national bank were wrongly taken into account in valuing the shares of the stockholders, because the provision under which they were taxed to the bank was intended to be exclusive and to prevent the values in the shares from being made, directly or indirectly, a basis for any other or further taxation. On the first and second points, the members of the court were all in accord, but on the third there was a strong dissent,—the matter in difference being whether the State, consistently with the terms and spirit of the congressional assent, could tax the shares in the hands of the bank which owned them, and also subject the values in them to another tax laid on the bank's stockholders. The difference was resolved against the further taxation because of what was deemed an implicit restriction in the congressional assent. There had been no prior decision on that point, and it is not involved in the case now under consideration.

What has been said respecting the tax-exempt securities among the bank's assets disposes of the contention

relating to its stock in a federal reserve bank. If, as is insisted, the stock was exempt, it was to be treated and considered in the same way that the securities were. And whether exempt or not, there was no authority for taxing it to the bank, but only for taking it into account in valuing the shares of the stockholders.

The contention that the state statute subjects shares in a national bank to a higher rate of taxation than is laid on other moneyed capital in the hands of individual citizens is rested on the fact that in assessing capital employed in private banking the part invested in tax-exempt securities of the United States is deducted, while in assessing national bank shares the bank's investment in such securities is not deducted.

The provision found in the congressional assent, that the taxation of the shares "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," has been considered by this court so many times that its purpose and meaning have come to be pretty well understood. Its main purpose is to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a business similar to that of national banks or engaging in operations and investments of a like character; and the restriction comprehends a discrimination effected through rules for fixing valuations quite as much as one effected by using different percentages in computing taxes on fixed valuations. *People* v. *Weaver*, 100 U. S. 539, 545; *Mercantile National Bank* v. *New York*, 121 U. S. 138, 155; *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373, 385.

Our concern here is not with a voluntary refusal or intentional omission on the part of the State to tax other moneyed capital of citizens as it taxes national bank shares, but with a submission by the State to superior

laws of the United States exempting a part of the other moneyed capital from state taxation. It may be helpful to state the matter in another way. National bank shares are taxable,—made so by the congressional assent. That much or little of the bank's assets consists of tax-exempt securities of the United States does not affect the taxability of the shares,—they being distinct from the corporate assets. The State taxes such shares without regard to the exempt government securities held by the bank. The capital of private bankers is taxable, save the part invested in exempt government securities. The State taxes all of that capital, save the exempt securities. They are exempt because the United States makes them so, and the State merely respects the exemption. In what is thus done does the State discriminate against national bank shares and in favor of other moneyed capital in the sense of the restriction? The question is not new; nor can it be regarded as an open one in this court.

In *People* v. *Commissioners,* 4 Wall. 244, the question was whether, in the presence of the restriction, a State could assess and tax to their owners shares in national banks without making any deduction on account of tax-exempt securities of the United States held by the banks, when in taxing moneyed capital of individuals employed in competition with those banks such a deduction was made. The court gave an affirmative answer to the question, saying, p. 256:

"The answer is, that upon a true construction of this clause of the act, the meaning and intent of the lawmakers were, that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens.

"This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the State, who make its laws and provide for its taxes. They can not be greater than the citizens impose upon themselves. It is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries, and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.

"The objection is a singular one. At the time Congress enacted this rule as a limitation against discrimination, it was well known to that body that these securities in the hands of the citizen were exempt from taxation. It had been so held by this court, and, for abundant caution, had passed into a law.

"The argument founded on the objection, if it proves anything, proves that these securities should have been taxed in the hands of individuals to equalize the taxation; and, hence, that Congress by this clause in the proviso intended to subject them, as thus situated, to taxation; and, therefore, there was error in the deduction. This we do not suppose is claimed. But if this is not the result of the argument, then, the other conclusion from it is, that Congress required that the commissioners should deduct the securities, and at the same time intended the deduction, if made, should operate as a violation of the rate of the tax prescribed. We dissent from both conclusions."

That view of the matter has been adopted and given effect in all subsequent cases presenting the question. *Lionberger* v. *Rouse*, 9 Wall. 468, 475; *Hepburn* v. *School Directors*, 23 Wall. 480, 485; *Adams* v. *Nashville*, 95 U. S.

19, 22; *Mercantile National Bank* v. *New York*, 121 U. S. 138, 149, 161. Counsel for the bank regard *Van Allen* v. *The Assessors, supra*, p. 581, as making for the other view. But that it does not do so is plainly pointed out in *Mercantile National Bank* v. *New York, supra*, p. 152. We perceive no reason for disturbing prior decisions on the point.

Our conclusion is that none of the objections urged against the state statute is well taken.

Judgment affirmed.

ST. JOHNS N. F. SHIPPING CORPORATION, OWNER, &c. *v.* S. A. COMPANHIA GERAL COMMERCIAL DO RIO DE JANEIRO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 43. Argued October 4, 1923.—Decided November 12, 1923.

1. A preliminary freight reservation agreement for carriage of goods "on or under deck, ship's option," and subject "to terms of bills of lading in use by steamer's agents," gives the ship an option as to place of stowage; and, in the absence of a general port custom to the contrary, the issuance thereafter of a clean bill of lading amounts to a positive representation by the ship that the option has been exercised and that the goods will go under deck. P. 123.
2. Where rosin shipped under a clean bill of lading was stowed on deck, and was jettisoned during the voyage to relieve the ship in a storm, *held*, that the ship was liable as for a deviation, could not escape by reason of relieving clauses in the bill, and must pay damages measured by the value of the goods at destination. P. 124.

280 Fed. 553, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which affirmed a decree of the District Court, in admiralty, awarding damages against a ship for loss of cargo.

Mr. Clarence Bishop Smith, with whom *Mr. Henry M. Hewitt* was on the brief, for petitioner.

Silence in a bill of lading may give rise to a promise to carry cargo under deck, but in every such case this is due to the fact that the surrounding circumstances are such as to make a reasonable man presume that the shipowner will carry the cargo under deck. Silence of itself is not a promise. It is the surrounding circumstances which speak. There are three leading classes of cases: (1) where shipment under deck is customary and there is no controlling contract; (2) where shipment on or under deck, at ship's option, is customary and there is no controlling contract; (3) where custom is controlled by contract.

(1) On the first class, where shipment under deck is customary, and no contract controls, see, *The Delaware,* 14 Wall. 579; *The Sarnia,* 278 Fed. 459. These cases squarely support the three classifications above set forth. In both, goods were carried in a trade where it was customary to carry under deck and nothing was stated in the bill of lading about the place of shipment. In both, testimony was offered to modify the custom by an oral contract, and the court refused to admit such evidence on the ground of the parol evidence rule. With such evidence shut out, both courts construed the bill of lading, which thus constituted the entire contract between the parties, to give a promise to carry under deck. In the absence of a proved contract modifying the custom, the custom spoke when the bill of lading was silent.

(2) Where shipment on or under deck, at ship's option, is customary, and there is no controlling contract, the usual bill of lading is issued, making no mention of stowage on deck, and the consignee cannot complain if cargo is stowed on deck. If the shipper wishes to find out if the cargo has been stowed on deck he must inquire. This type of cases dates from the earliest days and is referred to in the summary of the law given in *The Delaware, supra.* An example is *The Del Norte,* 234 Fed. 667; *Barber* v. *Brace,* 3 Conn. 9.

(3) Deck shipment controlled by contract. There is nothing inconsistent between a bill of lading with no loading endorsement on it, and a written contract allowing shipment on deck. The two documents should be construed together. The leading case is *Lawrence* v. *Minturn,* 17 How. 100. See *Gould* v. *Oliver,* 4 Bing. 134.

The Delaware and *The Sarnia,* where relied on by the opinion of the court below in the present case, deal with the parol evidence rule and the construction of the bill of lading in the absence of a provable written agreement. In order that there may be no misconception as to the scope of the decisions, they expressly state that if there was a clean bill of lading and written consent to stow on deck, the carrier can stow on deck. In *Lawrence* v. *Minturn* the written consent was expressed exactly as it was in the instant case in the freight contract.

(4) No duty on carrier to notify shipper as to stowage. The cargo owner asks this Court to find that there was an implication in the contract that notice of the place of stowage would be stated in the bill of lading. There is no reason for the implication; notice to the shipper of the deck stowage was not essential to the carriage of the rosin, and, if the shipper required notice as to how the option was to be exercised, it should have so provided in the contract of affreightment. *Armour & Co.* v. *Walford,* [1921] 3 K. B. D. 473.

The freight contract as drawn up by the shipper's broker was the basic agreement. It set forth the terms of carriage, named the vessel, the freight rate, the nature and the amount of cargo and stipulated that the shipment might be stowed on deck at ship's option. It further stated that it was subject to the conditions of the Act of Congress of February 13, 1893, and to terms of bills of lading in use by the vessel's agents.

The nature of a bill of lading is such that it operates both as a receipt and as evidence of the contract of car-

riage. Michie, Carriers, p. 331; *Van Etten* v. *Newton*, 134 N. Y. 143.

The bill of lading on which libelant relies functioned primarily as a commercial shipping receipt and secondarily as a contract of carriage to the extent that its provisions supplemented the original agreement. There is no sound reason for ignoring the original contract, which permitted stowage on deck. *Herr* v. *Tweedie Trading Co.*, 181 Fed. 483; *Ardan S. S. Co.* v. *Theband*, 35 Fed. 620; *Northern Pacific R. R. Co.* v. *American Trading Co.*, 195 U. S. 439; *Donovan* v. *Standard Oil Co.*, 155 N. Y. 112.

In any event, the liability of the schooner should have been limited to the invoice cost of the cargo as provided by the bill of lading.

It was error to hold that the bill of lading and all its terms were wiped out by the absence of a notation on the bill of lading that the shipment was on deck. The consent to deck stowage was sufficiently evidenced in the bill of lading as issued when that document is read in conjunction with the freight contract that preceded it.

Under the circumstances of this case, the deck stowage is not analogous to a voluntary deviation, and the effect of such deviation, namely, the wiping out of the conditions of a bill of lading, is not involved. In deviating, the ship breaches the entire contract and should not be allowed to revive it for the purpose of cutting down the damages. *The Sarnia*, 278 Fed. 459, distinguished. See *The Hadji*, 18 Fed. 459; *The Oneida*, 128 Fed. 687.

Mr. E. Curtis Rouse, with whom *Mr. J. Dexter Crowell* was on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

The General Commercial Company, Ltd., doing business as commission merchant and exporting concern at

New York, in May, 1918, sold 800 barrels of rosin c. i. f. to the respondent, a Brazilian corporation, and procured a written freight reservation or agreement from the agents of the schooner St. Johns N. F. to carry the goods to Rio de Janeiro, "on or under deck, ship's option," and subject "to terms of bills of lading in use by steamer's agents."

The rosin was loaded on board June 11th and clean receipts—without endorsement concerning stowage—were given therefor. A day or two later, upon prepayment of freight, the ship issued a clean bill of lading in the usual form. It contained no reference to the prior freight agreement. The goods were placed on deck, but neither the shipper nor the consignee knew this until after the loss occurred. There was no general custom at the port so to stow goods of this kind for such a voyage. The vessel was a general ship carrying many kinds of merchandise and no charter-party question is involved. She sailed from New York June 19th. Before reaching Rio de Janeiro she encountered a storm and for sufficient cause the master jettisoned the rosin in order to relieve her. The loss resulted directly from the ondeck stowage; the underdeck cargo was safely delivered.

Respondent libeled the schooner and demanded the value of the goods at destination. It claims that by issuing the clean bill of lading the vessel in effect notified the shipper that she had exercised the option specified by the freight agreement and would stow under deck. Also, that the ship broke her contract as by deviation and thereby lost the benefit of limitation or relieving clauses in the bill.

The owners maintain that as the freight agreement gave an option as to place of stowage it was unnecessary for the bill of lading to specify the action taken in respect thereto, and that silence did not amount to a promise to carry under deck. Moreover, that consent to deck stowage sufficiently appeared by the bill of lading read

with the freight agreement and therefore there was no departure and no ground for assessing damages.

The court below sustained the position of the respondent and decreed accordingly. 280 Fed. 553.

We find no conflict between the written original freight contract and the bill of lading. The former referred to a bill thereafter to be issued and made the place of stowage optional with the ship. When issued under such circumstances the bill amounted to a declaration that the option had been exercised and the goods would go under deck.

We are not dealing with a case arising under a general port custom permitting above deck stowage notwithstanding a clean bill, with notice of which all shippers are charged. When there is no such custom and no express contract in a form available as evidence, a clean bill of lading imports under deck stowage. *The Delaware*, 14 Wall. 579, 602, 604, 605. Upon this implication respondent had the right to rely. To say that the shipper assented to stowage on deck is not correct. It gave the vessel an option, and the clean bill of lading amounted to a positive representation by her that this had been exercised and that the goods would go under deck.

By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had been agreed and thereby directly caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit,[1] and must account for the value at

[1] The bill of lading provides—

"The carrier shall not be liable for loss or damage occasioned by, due to or arising from causes beyond the carrier's control, by the act of God, vis major, by collision, stranding, jettison or wreck, perils of the sea or other waters, by fire from any cause or wheresoever occurring."

"In computing any liability for negligence or otherwise, by the shipowner as carrier or otherwise, regarding any property hereby

destination. Generally, the measure of damages for loss of goods by a carrier when liable therefor is their value at the destination to which it undertook to carry them. *Lawrence* v. *Minturn,* 17 How. 100, 111; *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, 596; *New York, L. E. & W. R. R. Co.* v. *Estill,* 147 U. S. 591, 616; *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97, 100; *Royal Exchange Shipping Co.* v. *Dixon,* 12 A. C. [1887] 11; *The Sarnia,* 278 Fed. 459; Hutchinson on Carriers, vol. 3, § 1360; Carver on Carriage of Goods by Sea, 6th ed., § 287.

The decree below is affirmed.

SUPERIOR WATER, LIGHT & POWER COMPANY *v.* CITY OF SUPERIOR ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 57. Argued October 9, 1923.—Decided November 12, 1923.

1. Where a municipality, with express power from the legislature, enters into a contract whereby in consideration of the construction, maintenance and operation of a water system by a water company it grants the company the exclusive right to maintain and operate for a specified period and agrees to extend the term when it expires or to purchase the entire plant at a price to be determined by capitalizing the net earnings of the year preceding the purchase, the rights acquired by the company are rights of property which are not subject, under the Constitution, to be impaired by subsequent legislation attempting to substitute for the company's franchises an "indeterminate permit" to continue in force until the municipality shall elect to purchase upon terms to be fixed by a state commission. P. 135.

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receipted for no value shall be placed on the said property higher than the invoice cost not exceeding $100 per package (or such other value as may be expressly stated herein), nor shall the shipowner be held liable for any profits or consequential or special damages, and the shipowner shall have the option of replacing any lost or damaged goods."

2. A power to alter or repeal incorporation acts, reserved by state constitution, will not be held applicable to property rights of a corporation acquired by contract with a city, when not clearly so construed by state decision antedating the contract. *Id.*

174 Wis. 257; 176 id. 626, reversed.

ERROR to a judgment of the Supreme Court of Wisconsin for the City in a suit by the Water Company to restrain the City from condemning the company's plant, and praying specific performance of the City's contract to purchase it or extend the company's franchise.

Mr. Frank B. Kellogg, with whom *Mr. Harry L. Butler* was on the brief, for plaintiff in error.

Mr. L. Hanitch and *Mr. T. L. McIntosh*, with whom *Mr. C. M. Wilson* was on the briefs, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Since 1848 the Constitution of Wisconsin has contained the following clause. "Art. XI, Sec. 1. Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation can not be attained under general laws. All general laws or special acts, enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

Chapter 359, Private Laws of Wisconsin 1866, incorporated plaintiff in error's predecessor, the Superior Water Works Company, and empowered it to make "any agreements, contracts, grants and leases for the sale, use and distribution of water as may be agreed upon between said company and any person or persons, associations and

corporations, and with the town of Superior, or neighboring towns; or the said company itself may take and use the surplus water for manufacturing and other purposes; which said agreements, contracts, grants and leases shall be valid and effectual in law."

On October 15, 1887, in order to provide fire protection and secure pure and wholesome water, and in consideration of benefits to accrue therefrom, the Village of Superior, a municipal corporation, by ordinance, granted to Superior Water Works Company, its successors and assigns, for a period of thirty years, the privilege of establishing, maintaining and operating a complete system of water works. The ordinance specified the duties and obligations of the parties and, among other things, provided, that the village would abstain for thirty years from granting the right to lay water pipes in its streets to any other party and that the main source of water should be Superior Bay; but if the village at its expense should secure an indefeasible right to lay pipes across Minnesota Point in the State of Minnesota, etc., the company would take water from Lake Superior. And further that "at the expiration of the said thirty years, should the said village refuse to grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of water works for another term of thirty years, upon the said terms and conditions as may exist between the said village or city and the said Superior Water Works Company, at the expiration of the 1st thirty years, in and upon the public grounds and streets of the said village and to supply the said village and the inhabitants thereof with water on reasonable terms, then and in such case, the village shall purchase from said Superior Water Works Company, its successors or assigns, said system of water works and the property connected therewith, at a fair valuation as provided for in section XIII."

Section XIII provided for arbitrators to determine the actual value of the plant, exclusive of privileges granted by the village, not to exceed what it would cost to construct the same, etc. Section XIV: "Within thirty days after the passage of this ordinance said Superior Water Works Company may file with the village clerk its acceptance thereof, duly acknowledged before some authorized officer and from and after the filing of said acceptance this ordinance shall have the effect of and be a contract between the village of Superior and the Superior Water Works Company and shall be the measure of the rights and liabilities of said village as well as of said company, and in case such acceptance is not so made and filed within thirty days after the passage of this ordinance, the village board shall have the right to repeal the same."

The corporation accepted the ordinance, constructed the plant and many extensions, spent large sums in connection therewith; and long continued to operate it

In March, 1889, the territory constituting the Village of Superior was incorporated as the City of Superior. The charter declared that "all franchises heretofore granted, or contracts entered into, by the village of Superior, shall continue and remain in force in accordance with the terms thereof, as if the same had been granted or entered into by said city of Superior." (C. 152, Laws 1889.) It further empowered the city "to provide for the purchase, construction, maintenance and operation of water-works for the supply of water to the inhabitants of the city, and to supply such city with water for fire protection and other purposes; and to secure the erection of water-works, said city may, by contract or ordinance, grant to any person, persons, company or corporation, the full right and privilege to build and own such water-works, and to maintain, operate and regulate the same; and in doing so, to use the streets, alleys and bridges of the city in laying and maintaining the necessary pipe lines and hydrants for such term of years and on such conditions as may be prescribed

by such ordinance or contract; and may also, by contract or ordinance, provide for supplying from such water-works, the city with water for fire protection and for other purposes, and also the inhabitants thereof with water for such term of years, for such price, in such manner, and subject to such limitations as may be fixed by said contract or ordinance."

October 1, 1889, with the express assent of the Superior Water Works Company and in consideration of the waiver of certain rights by the latter, the City of Superior amended section XIII, Ordinance of October 15, 1887, so as to provide that, if purchased, the price to be paid for the water works plant should be ascertained by capitalizing the net earnings of the preceding year at five per centum.[1] Sections II and III of this ordinance follow.

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[1] Section I. Ordinance number 5 of the general ordinances of the village (now city) of Superior, entitled "an ordinance amending and reenacting section XIII of an ordinance authorizing the Superior Water Works Company, its successors or assigns, to construct, operate and maintain a system of water works in the village of Superior, Douglas County, Wisconsin, and contracting with said company for a supply of water for the use of said village and the inhabitants thereof, and defining their rights, privileges and powers," is hereby amended by striking out of said ordinance all of said ordinance after the words "Section XIII," where the said words "Section XIII" occur, in the thirteenth line thereof and inserting in lieu thereof the following:

This ordinance is passed upon the express condition that at the expiration of twenty years after the date of the passage of this ordinance and of every fifth year thereafter, the city of Superior may, at its option, purchase from the said Superior Water Works Company, its successors or assigns, the entire plant of the said Superior Water Works Company, its successors or assigns, and including all franchises theretofore granted to said Superior Water Works Company, its successors or assigns, by the village or city of Superior, by paying therefor, in cash, an amount of money, of which the net earnings of said Superior Water Works Company, for the year next preceding the purchase thereof, by said city, shall be five per centum. Such purchase shall be made in the following manner, to-wit: The common

"Section II. This ordinance is passed upon the consideration to the city of Superior that the said city is hereby released and relieved from the duty, cost and expense of procuring, for said Superior Water Works Company, the valid and indefeasible right to extend and lay its pipes across the bay of Superior and across Minnesota Point, to the shores of, and into Lake Superior, as provided in section II of said ordinance number one of the general ordinances of the village of Superior and that all that part of said section No. II, commencing with the word 'provided' in the twentieth line thereof, down to and including the word 'completed' in the sixty-second line thereof,

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council at its first regular meeting after the expiration of said twenty years, or of any fifth year thereafter, may pass an ordinance declaring its intention to purchase said plant and franchises appropriating the necessary funds therefor and directing the city clerk of said city, to serve upon said Superior Water Works Company, its successors or assigns, a copy of said ordinance, together with a notice that at the expiration of one year from the date of the service of said notice, the said city will pay to said Superior Water Works Company, its successors, or assigns, the price of said plant and franchises, determined as by this ordinance provided, and will assume possession of said plant and franchises. Commencing with the day following the date of the service of such notice, the said Superior Water Works Company, its successors or assigns, shall keep an accurate account of all receipts and disbursements of said company, in a set of books kept expressly for that purpose and for no other, which said books shall at the expiration of each quarter year thereafter be open to the inspection of the city comptroller of said city. At the expiration of one year from the date of the service of the notice above provided for, the said Superior Water Works Company, its successors or assigns, shall submit to the comptroller of said city, the said books of account, and the price to be paid for said plant and franchises shall be determined therefrom, as hereinbefore provided and upon the payment, in full, of said price, the said Superior Water Works Company, its successors or assigns, shall surrender to said city its said plant and franchises complete. The words "net earnings" as used in this ordinance, shall mean the gross earnings of said water works, less the actual operating expenses thereof.

is hereby repealed. And this said ordinance is passed upon the further consideration to the city of Superior, that by the acceptance hereof the said Superior Water Works Company binds itself, its successors and assigns, to obtain at its own expense an adequate supply of good and wholesome water for domestic and public purposes from said Lake Superior and to furnish the same to the inhabitants of said city and to said city as provided in said ordinance number one as hereby amended within two years from the acceptance of this ordinance by said Superior Water Works Company.

"Section III. This ordinance is passed with the consent of the Superior Water Works Company and upon filing a written acceptance by it with the city clerk of the said city of Superior the said ordinance with all other ordinances of said city or the village of Superior granting to the said Superior Water Works Company any rights or franchises shall be and become and is hereby made a binding contract as so amended and modified."

In compliance with the foregoing ordinance and agreement the supply lines of the water system were extended across Minnesota Point, in the State of Minnesota, and into Lake Superior. The company also acquired a parcel of land on that point and there installed wells, machinery and equipment which became an essential part of the system.

On November 1, 1889, the Superior Water Works Company sold and transferred its plant with all appurtenant rights and privileges to plaintiff in error, the Superior Water, Light and Power Company. Three ordinances amended the grant of 1887 (in ways not now necessary to detail) in 1889, 1896 and 1899. Two of these provided for and received express acceptance by plaintiff in error.

In 1907 the Wisconsin Legislature enacted the Public Utility Law (c. 499, Laws 1907, §§ 1797m–1 to 1797m–109, Wis. Stats.), which created the Railroad Commis-

sion, a regulatory body, and authorized public utilities to surrender existing franchises and accept in lieu thereof "indeterminate permits." Chapter 596, Laws 1911, repealed the optional feature of the statute of 1907 and directed that every license, permit or franchise granted by the State or by any town, village or city to any corporation authorizing the latter to operate a plant for furnishing heat, light, water or power, etc., etc., "is so altered and amended as to constitute and to be an 'indeterminate permit' within the terms and meaning of sections 1797m–1 to 1797m–108, inclusive, of the statutes of 1898, and subject to all the terms, provisions, conditions, and limitations of said sections 1797m–1 to 1797m–108, inclusive, and shall have the same force and effect as a license, permit, or franchise granted after July 11, 1907, to any public utility embraced in and subject to the provisions of said sections 1797m–1 to 1797m–108, inclusive, except as provided by section 1797m–80." One of the provisions to which reference is made gives the municipality the right to purchase upon terms to be fixed by the State Railroad Commission.

The statute (§ 1797m–1) declares the term "'indeterminate permit' . . . shall mean and embrace every grant, directly or indirectly, from the state, to any corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, which shall continue in force until such time as the municipality shall exercise its option to purchase as provided in sections 1797m–1 to 1797m–109, inclusive, or until it shall be otherwise terminated according to law."

Plaintiff in error has not voluntarily submitted to the Public Utility Law.

On October 15, 1917, the prescribed thirty-year limitation expired and plaintiff in error requested the City of Superior either to grant further right to maintain the system of water works or to purchase the same as provided by the ordinance of 1887 as amended in 1889. The city failed to make the grant; denied its obligation to purchase; and took steps under provisions of §§ 1797m–1 to 1797m–109, Wisconsin Statutes, to condemn the entire plant. Thereupon plaintiff in error instituted the present cause against the city, its mayor and councilmen. The complaint sets out the foregoing facts, alleges repudiation of the obligation to purchase and the steps taken for condemnation, and asks a decree requiring the city specifically to perform its agreement, for an injunction restraining further efforts to condemn and for general relief.

The trial court overruled a general demurrer, but this action was reversed by the Supreme Court, 174 Wis. 257, which held that the Act of 1907 (c. 499) as amended in 1911 was permissible under the reserved power to alter, amend or repeal acts providing for formation or creation of corporations; and that it had substituted an "indeterminate permit" for the rights granted to the plaintiff in error by the municipality. "A new franchise was therefore granted to the defendant in lieu of its original franchise by the enactment of c. 596, Laws 1911. Thereafter its franchise was that of the indeterminate permit, and it was subject to the provisions of the public utility law. This also was its franchise on October 1, 1917, when it is claimed its original franchise expired. The public utility law had superseded everything of a franchise nature embodied in the original ordinance granted to it by the village of Superior and the subsequent and succeeding amendments thereto." And also that it was immaterial whether or not a contract between the city and the water company resulted from the clause of the original

ordinance providing for extension of the grant or purchase after thirty years, because "even though it be considered as a contract, we think it gives rise to no obligation on the part of the city to purchase the plant according to its terms."

The court further said—

"The manifest purpose of the provision was to insure the Water Company one of two things: either a renewal of its franchise for another period of thirty years or a sale of its property in case such franchise be not renewed. The franchise called for was one having 'the same terms and conditions as may exist between the said village or city and the said Superior Water Works Company at the expiration of the first thirty years.' The franchise which it had at that date was the indeterminate permit. That was either its franchise or it had none. That was a continuing franchise. It was indeterminate as to time. It was not limited to thirty years or any other period. Consequently there was no occasion for the city to 'grant to the said Superior Water Works Company, its successors or assigns, the right to continue and maintain said system of waterworks.' It already had that right. There was therefore no breach of this part of the alleged contract on the part of the city. Until there was a breach of this provision of the contract, no obligation on the part of the city to purchase according to the terms of the contract arose. It seems plain that the position of the Water Company is not helped by construing this provision of the ordinance as a contract made by the city in its proprietary capacity. The conditions precedent to an obligation on the part of the city to buy under the terms of the contract have not come to pass, and the city has in no manner become obligated to carry out the feature of the contract which is sought to be enforced in this action."

Considering the opinions of this court, it seems clear enough that a valid contract resulted from the dealings

between the City of Superior and plaintiff in error whereby each became obligated to do certain specified things. The company agreed to construct, maintain and operate an adequate water works system. The city obligated itself to recognize the company's exclusive right to maintain and operate the system for a definite period—thirty years; and also to purchase the entire plant at a price fixed in the manner specified if at the conclusion of such period it should refuse to grant an extension. The rights so acquired by plaintiff in error were property. *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 384; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, 536; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496; *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 664; *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S. 544, 556; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 73; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 117; *Detroit United Ry.* v. *Michigan*, 242 U. S. 238, 253; *Northern Ohio Trac. Co.* v. *Ohio*, 245 U. S. 574, 585; *Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399, 407.

Concerning the relation between the parties the court below declared, "the franchise of the Water Company, which enables it to pursue its business of supplying water to the city of Superior and its inhabitants, is a contract between it and the state." But it held the legislature had power to change this contract under the reservation permitting alterations, in § 1, Art. XI, of the State Constitution, and that the Act of 1911 did modify the contract by substituting for rights thereby secured an "indeterminate permit."

Through its contract with the city the water company acquired valuable property rights. They were not directly created by any statute enacted under § 1, Art. XI, of the State Constitution, but were the outcome of agree-

ment with a fully empowered corporation. They did not arise from the mere exercise of a governmental function legislative in character, but from contract expressly authorized by the legislature. None of the decisions of the Supreme Court of Wisconsin prior to 1889 to which we have been referred [2] construes the reservation in the State Constitution as having the extraordinary scope accorded to it below; and certainly in the absence of some very clear and definite pronouncement we cannot accept the view that it then had the meaning now attributed to it.

As late as 1909, in *State ex rel. Northern Pacific Ry. Co.* v. *Railroad Commission,* 140 Wis. 145, 157, that court announced, "The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted. . . . The reserve power stops short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control over corporations, and must be construed in connection with the other provision of the constitution to the effect that private property shall not be taken for public use without compensation. It follows, therefore, 'that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the

[2] *Madison, Watertown & Milwaukee Plankroad Co.* v. *Reynolds,* 3 Wis. *287; *Pratt* v. *Brown,* 3 Wis. *603; *Nazro* v. *Merchants' Mutual Insurance Co.,* 14 Wis. *295; *Kenosha, Rockford & Rock Island R. R. Co.* v. *Marsh,* 17 Wis. *13; *Whiting* v. *Sheboygan & Fond du Lac R. R. Co.,* 25 Wis. 167; *Wisconsin* v. *Milwaukee Gas Light Co.,* 29 Wis. 454; *West Wisconsin R. R. Co.* v. *Board of Supervisors of Trempealeau County,* 35 Wis. 257; *Attorney General* v. *Railroad Companies,* 35 Wis. 425.

'powers granted.' *Commonwealth* v. *Essex Co.*, 13 Gray, 239." See also *Water Power Cases*, 148 Wis. 124, 136.

The integrity of contracts—matter of high public concern—is guaranteed against action like that here disclosed by § 10, Art. I, of the Federal Constitution, "No State shall . . . pass any . . . law impairing the obligation of contracts." It was beyond the competency of the legislature to substitute an "indeterminate permit" for rights acquired under a very clear contract. *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496; *Detroit United Ry.* v. *Michigan*, 242 U. S. 238, 253. The erroneous conclusion concerning this federal question led to the decree below. Accordingly it must be set aside and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

BAKER, RECEIVER OF THE INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY, ET AL. *v.* DRUESEDOW, TAX COLLECTOR OF HARRIS COUNTY, TEXAS, ET AL.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 12. Argued October 2, 1923.—Decided November 12, 1923.

1. That the Fourteenth Amendment does not prevent a State from taxing the intangible property of a railroad, ascertaining its value by deducting the value of its physical assets from the value of its property as a whole, within the State; or from taxing railroads by other rules than those prescribed for other business concerns; or from imposing double taxation,—are propositions long settled, denial of which is frivolous. P. 140.
2. Over-assessment due to mere error of judgment is not reviewable here as a violation of due process of law. P. 141.
3. Where assessments of tangible and intangible railroad property are made independently by separate boards, but the taxes are laid on both at the same rate, collected by the same county officers, and treated by the state law as constituting together a single

ad valorem tax, systematic and intentional assessment of the intangibles at full value while tangible property in general is assessed at less, does not deny a railroad equal protection of the law, if, by reason of lower valuation of its tangible property, its property in the aggregate is not valued at a higher rate than other property in the county. P. 142.

229 S. W. 493, affirmed.

REVIEW of a judgment of the Supreme Court of Texas, sustaining and enforcing a tax on railroad property, in a suit brought by its receivers to enjoin collection. The questions concerning the validity of the state taxing statute, upon which the writ of error was based, are held to be without substance, and that writ is dismissed; but the writ of certiorari is granted and under it other questions, arising in the administration of the statute, are reviewed.

Mr. Samuel B. Dabney for plaintiffs in error and petitioners.

Mr. W. A. Keeling, Attorney General of the State of Texas, for defendants in error and respondents, submitted. *Mr. Frank M. Kemp,* Assistant Attorney General, was also on the briefs.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought in a state court of Texas by the receivers of a Texas corporation, the International & Great Northern Railway, against the taxing authorities for Harris County. It seeks to enjoin the collection of the tax assessed for the year 1915 upon the so-called intangible property of the company within that county. The trial court denied the relief prayed; and, on defendants' cross action and a plea in reconvention, entered judgment against the plaintiffs for the amount of the tax. The Court of Civil Appeals reversed this judgment and granted the injunction. 197 S. W. 1043. Its judgment was in turn reversed by the Supreme Court of the State

which affirmed the judgment of the trial court. 229 S. W. 493. The case comes here on writ of error under § 237 of the Judicial Code as amended; and also on a petition for a writ of certiorari, consideration of which was postponed until the hearing on the writ of error. The claims are that the statute under which the taxes were assessed is obnoxious to the Fourteenth Amendment; and that rights guaranteed by it have been denied in the administration of the statute.

Under the laws of Texas *ad valorem* taxes for both state and county purposes, are laid upon the property of a railroad in every county in which its line is located. The value is determined separately for tangible and for intangible property. The assessment of the tangible property is made by county officials. The assessment of the intangible property is fixed by the State Tax Board. It values the intangible property of the company as a whole; and then apportions the amount among the several counties on a mileage basis. Upon the aggregate of the assessments of the tangible and the intangible property so made for each county, the tax is laid by the county officials at the rate found to be necessary and collected by the county's tax collector.[1]

Intangible values of a railroad company have been declared by the highest court of the State to mean "the values of the railroad properties above the value of its physical assets." *Missouri, Kansas & Texas Ry. Co.* v. *Shannon,* 100 Texas, 379, 390. Under the statute the value of the intangible is to be determined by deducting the value of the tangible from the value of the entire railroad property. Article 7420. To enable the State Board to determine the values, the company is required to furnish data. Articles 7415–7419. The Board, on the other

[1] See 1911 Revised Civil Statutes, c. 4, Title 126, Articles 7407 to 7426; Act of April 17, 1905, as amended May 16, 1907. See also cc. 12, 13, Title 126.

hand, is required to submit a preliminary estimate of the valuation and to give the company an opportunity to be heard thereon, so that changes may be made before the valuation is declared effective. Some methods of calculation are set forth in the statute; but it is provided that these are not to be deemed mandatory; that all available evidence must be considered; and that the method of calculation which will best bring about a fair valuation shall be adopted. Article 7419.

The Board duly submitted its preliminary estimate. This it later amended upon the discovery of an error. Thereupon a hearing was held at which the company introduced evidence. The Board adhered to its own estimate as amended. The aggregate assessment for the year 1915 upon this railroad's property within Harris County was $1,709,332. Of this amount, $603,227.44 was on intangible property. The tax rate was $1.09½ per $100 of valuation. The amount of the tax so laid was $6,605.34. The trial court found that the actual value of the tangible property alone in Harris County was $3,205,202.09; and that the assessment upon this was only 34 per cent. of that value.

The contention that the statute violates the Fourteenth Amendment is wholly without merit. It has long been settled that the due process clause does not preclude a State from taxing the intangible property of a railroad, or from ascertaining its value substantially in the manner prescribed by the statute herein assailed; that the equal protection clause is not violated by prescribing different rules of taxation for railroad companies than for concerns engaged in other lines of business; [2] and that the Federal

[2] See *State Railroad Tax Cases*, 92 U. S. 575; *Railroad Co.* v. *Vance*, 96 U. S. 450; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Columbus Southern Ry. Co.* v. *Wright*, 151 U. S. 470; *Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 220; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171.

Constitution does not afford protection against double taxation by a State, which is here alleged.[3] The writ of error is dismissed. The contention that the due process and equal protection clauses have been violated in administering the statute is rested upon many claims. Two of them are substantial. The writ of certiorari is, therefore, granted. But, for the reasons to be stated, the judgment below must be affirmed.

The company has 1106 miles of road and extends into thirty-seven counties. The alleged cost of its "road and equipment" to June 30, 1915, was $46,502,041.55; its alleged depreciated value (as of June 30, 1914) $37,243,133.44; its value as fixed by the Railroad Commission, $34,013,092.07. A foreclosure was effected in 1911. The reorganization largely reduced the capitalization, leaving outstanding a mortgage debt of only $25,239,000.00, and capital stock of $4,822,000. The net earnings of the company in 1911 to 1914 were so small that, if the property were capitalized on the basis of seven per cent., it would appear to have been worth less than $30,000,000 in 1912, and in 1914 less than $1,000,000. In the latter year the company, unable to pay its fixed charges, again passed into receivers' hands. The State Tax Board fixed the value of the physical property in 1915 at $28,372,810, and of the intangibles at $10,743,223; making the value of the entire property $39,116,033.

The receivers contend that, even if the value of the entire property was as found by the State Board, the physical property was undervalued, resulting in an overvaluation of the intangibles so gross as to amount to a denial of due process of law. There was evidence, including statements made by the receivers, which supports the State Board's valuation. The trial court, upholding this valuation, found that it represented the honest judg-

[3] *Kidd* v. *Alabama*, 188 U. S. 730, 732; *Cream of Wheat Co.* v *Grand Forks*, 253 U. S. 325, 330.

ment of the State Board; and that there was no evidence of arbitrary action or of improper motives on its part. This holding of the trial court was approved by the highest court of the State. There is no evidence of arbitrary action, of fraud, or of gross error in the system on which the valuation was made, to justify the claim of denial of due process. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Backus*, 154 U. S. 421, 434; *Maish* v. *Arizona*, 164 U. S. 599, 610. Mere errors of judgment are not subject to review in this proceeding. *Southern Ry. Co.* v. *Watts*, 260 U. S. 519, 527.

The receivers also contend that the tax is void, under the equal protection clause, because the tangibles were intentionally and systematically assessed, by the county authorities, at not more than 38 per cent. of their actual value, while intangibles were assessed, by the State Board, at their full value. Where illegal discrimination was practiced, it is immaterial whether it was effected by a single assessing board or through the action of two independent boards. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 513; *Southern Ry. Co.* v. *Watts*, 260 U. S. 519, 526. Under the laws of Texas the assessments are made by the separate action of two independent boards using different methods, but the taxes upon the tangible and the intangible property of railroads, are laid at the same rate, and are collected by the same county officers. It is the settled law of the State that equitable relief will not be granted, on the ground of discrimination, against an excessive assessment of either one, if, taking the tax on tangible and the tax on intangible property together, the taxpayer is not called upon to pay, on the average, on a higher percentage of the actual value than are other persons and property. *Missouri, Kansas & Texas Ry. Co.* v. *Hassell*, 57 Tex. Civ. App. 522; *Druesedow* v. *Baker*, 229 S. W. 493. Thus, the taxes on the two kinds of property are treated by its courts as parts

of a single *ad valorem* tax on railroads. Their construction of the state statutes is binding upon us. The trial court found on adequate evidence that the aggregate assessment placed upon the tangible and the intangible property of the railroad in Harris County was about 45 per cent. of their aggregate true value, whereas the other property in the county was assessed at about 50 per cent. of its true value. Thus the railroad was not, in essence, subject to any discrimination. Compare *Davenport Bank* v. *Davenport,* 123 U. S. 83. The requirement of the equal protection clause was satisfied.

Affirmed.

EDWARD HINES YELLOW PINE TRUSTEES ET AL. *v.* UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND AMERICAN WHOLESALE LUMBER ASSOCIATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 91. Argued October 18, 19, 1923.—Decided November 12, 1923.

1. To maintain a suit to set aside an order of the Interstate Commerce Commission upon the ground that it exceeded the powers of the Commission, it is not essential that a plaintiff should have been a party to the proceedings before the Commission in which the order was made. P. 147.
2. But to maintain such a suit the plaintiff must show that the order alleged to be void subjects him to actual or threatened legal injury. P. 148.
3. Where the interest shown by a group of lumber manufacturers in attacking an order of the Commission, which abolished a penalty charge on lumber held at reconsignment points, was in the handicap which the charge imposed on competing jobbers, and in the possibility that its removal might divert the cars of carriers, including those of their own projected railroad, from transportation to storage uses,—*held,* that they had no standing to sue to set the order aside,

on the grounds that it exceeded the power of the Commission and violated the rights of carriers under the Fifth Amendment. *Id.* Affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission.

Mr. William S. Bennet, with whom *Mr. Homer J. Smith* and *Mr. Edward W. McGrew* were on the brief, for appellants.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Joseph E. Davies, with whom *Mr. Franklin D. Jones* and *Mr. Raymond N. Beebe* were on the brief, for American Wholesale Lumber Association, appellee, by special leave of Court.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought against the United States by an Illinois lumber concern in a federal court for Illinois to set aside as void an order entered by the Interstate Commerce Commission against carriers on February 11, 1922. The Commission and the American Wholesale Lumber Association—the petitioner in the proceedings before it—intervened in this suit as defendants. No carrier intervened. The plaintiffs had not been parties to the proceedings before the Commission, nor were they named in the order assailed. The United States moved to dismiss the bill on the ground that the plaintiffs had not shown such an interest in the subject matter as would entitle them to sue; and also for want of equity. The case was heard before three judges on application for a preliminary

injunction. It was agreed that the hearing should be treated as a final hearing. The court sustained the motion of the United States and entered a final decree dismissing the bill. That decree is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The essential facts are these: On October 20, 1919, the Director General of Railroads established a so-called penalty charge of $10 per car per day on lumber held at reconsignment points.[1] The declared purpose of the charge was "to prevent undue detention of equipment under the present emergency." The charge (in modified form) remained in force throughout the period of federal control; and thereafter it was continued by the carriers.

[1] The penalty was made payable for each day or fraction thereof; but only for the period that cars loaded with lumber or other forest products were held for reconsignment beyond 48 hours after the hour at which free time began to run under the car demurrage rules. By these rules 24 hours free time is allowed before any charge is made for storage and detention of the car at the reconsignment point. National Car Demurrage Rules (January, 1916) Rule 2, Sec. B, Par. 2. The penalty charge is declared to be in "addition to any existing demurrage and storage charges." *Sullivan Lumber Co.* v. *Great Northern Ry. Co.*, 58 I. C. C. 110, 111. The then existing demurrage charges were $2 a day per car for the first four days after expiration of the free time; and $5 per day for the fifth day and each day thereafter. Compare *Lowry Lumber Co.* v. *Director General*, 58 I. C. C. 113; 59 I. C. C. 90; *Wharton Steel Co.* v. *Director General*, 59 I. C. C. 613. Besides these demurrage charges there is a charge for the reconsignment privilege of $3 per car when reconsignment instructions are received at the reconsignment point prior to the arrival of the car, and a charge of $7 per car when the instructions are received after the arrival of the car. Compare *Reconsignment Case*, 47 I. C. C. 590; *Reconsignment Case No. 3*, 53 I. C. C. 455. Unlike the penalty charge, both demurrage charges and reconsignment charges are assessed upon shipments of all commodities. The demurrage charge is in part compensation to the carrier and in part a penalty to secure the release of equipment and tracks. *Demurrage Charges*, 25 I. C. C. 314, 315.

In September, 1920, the American Wholesale Lumber Association instituted proceedings before the Commission to secure cancellation of this charge as being unreasonable, unjustly discriminatory, unduly prejudicial and without warrant in law. The transit car privilege, permitting storage in cars for a short period at reconsignment points, is deemed an essential of the business by its members, who are largely jobbers and have no lumber yards. Protests against cancellation of the charge were filed by some associations of lumber manufacturers and dealers who customarily ship direct from the mills to their own lumber yards and have little occasion to use this reconsignment privilege. The imposition of the penalty charge was a direct benefit to them, since it subjected the jobbers, their competitors, to a severe handicap, and to that extent curbed the activities of these rivals. After extensive hearings the Commission held that it was within the power of the Director General, and of carriers, to establish penalty charges in order to prevent undue detention of equipment by shippers; that conditions existing at the time had warranted the establishment of a penalty charge; and that the charge then imposed had not been shown to be unreasonable. But the Commission also found that conditions had changed; that at the time of its decision there was a large surplus of service cars, which left the retention of the penalty charge without justification; and that while present conditions continue it is and will be unreasonable. An order was entered requiring carriers "to cease and desist . . . until further order of the Commission" from collecting the charge. The report stated "that our approval of the elimination of the charge at this time is based solely on existing conditions, and is not to be construed as an inhibition on carriers to publish penalty charges in the future if and when conditions warrant." *American Wholesale Lumber Association* v. *Director General*, 66 I. C. C. 393, 395, 408.

Plaintiffs are large manufacturers and dealers whose shipments are made mainly direct from the mills to destination. They claim that the order cancelling the penalty charge infringes their rights both as shipper and as prospective carrier. As shipper they claim to be injured because the jobbers are relieved from the handicap of the penalty charge; and also because longer detention of the cars at reconsignment points (which cancellation of the charge encourages) will subject shippers to the danger of car shortage, whenever general business again becomes active. Their claim of injury as prospective carrier is this: Plaintiffs are constructing in connection with a mill in Mississippi a local railroad which will soon be ready for operation. Cars acquired by them for use on their own railroad will naturally move to connecting lines and may then, in the absence of a deterring penalty charge, be used, like other cars, for temporary storage at reconsignment points; and the order of cancellation will encourage the use of plaintiff's cars for storage whereas their only legal use is for transportation. In this way the order entered not only prevents "the railroad from taking necessary steps to join the bulk of the lumber industry in suppressing the evil and dishonest practices" of jobbers, but prevents the railroads from charging an adequate rental (the penalty charge) for their equipment. The contention is that the order deprives railroads of the use of their property without due process of law in violation of the Fifth Amendment to the Federal Constitution to the detriment of plaintiffs who are interested in maintaining both a wholesome lumber business and effective transportation.

The mere fact that plaintiffs were not parties to the proceedings in which the order was entered does not constitute a bar to this suit. For it is brought to set aside an order alleged to be in excess of the Commission's power. *Interstate Commerce Commission* v. *Diffen-*

baugh, 222 U. S. 42, 49; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557. But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.,* 218 U. S. 88, 111. Plaintiffs' right is limited to protection against unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection. The correctness of those findings cannot be assailed here; among other reasons, because the evidence on which they were made is not before the Court. *Louisiana & Pine Bluff Ry. Co.* v. *United States,* 257 U. S. 114.

The further claims of plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car shortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate, may be diverted, at some time in the future, from transportation uses. If their fears are realized it will be open to them to apply to the Commission for relief. As the plaintiffs

do not show any interest which entitles them to sue, we have no occasion to consider either the power of carriers to impose the penalty charge or the power of the Commission to order its cancellation.

Affirmed.

UNITED STATES EX REL. BILOKUMSKY *v.* TOD, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 92. Argued October 19, 1923.—Decided November 12, 1923.

1. In proceedings by the immigration authorities to deport a person charged with being an alien within the United States in violation of law, alienage is a jurisdictional fact, which must be found, to sustain an order of deportation. P. 153.
2. The burden of proving alienage in such proceedings (with a statutory exception in Chinese cases), is on the Government. *Id.*
3. When an essential finding of fact in such proceedings is unsupported by evidence, the courts may intervene by *habeas corpus*. *Id.*
4. Where a person, arrested for deportation as an alien within the United States in violation of law in that he had in his possession for distribution printed matter advocating overthrow of the Government by force or violence, upon being called and sworn as a witness, by the Government, to prove his alienage, stood mute,—*held*, that admission of alienage, which is not an element of the crime of sedition, would not have tended to incriminate him, and that the immigration officers might properly have inferred the fact of alienage from his silence. P. 154.
5. Deportation proceedings are civil in character and the person arrested may be compelled by legal process to testify whether he is an alien. P. 155.
6. Mere interrogation under oath by a government official of one lawfully in confinement is not a search and seizure. P. 155.
7. The rules of the Secretary of Labor concerning deportation cases do not require that a person under investigation prior to application for warrant of arrest, shall be advised of his right to have

counsel and to decline to answer questions, before being interrogated as to his alienage. P. 155.

8. The use in evidence in a deportation proceeding of an admission of his alienage made previously by the person held for deportation, while he was in custody of state authorities,—*held*, not to render the hearing unfair, in view of corroborative evidence and his failure to deny alienage at the hearing. P. 156.

9. A person held for deportation by immigration officials will not be discharged on *habeas corpus* merely because the warrant of arrest was issued without probable cause, if the later proceedings were regular and afford sufficient ground for his detention. P. 158.

Affirmed.

APPEAL from an order of the District Court discharging a writ of *habeas corpus* and remanding the relator and appellant to the custody of the Commissioner of Immigration.

Mr. Walter Nelles, with whom *Mr. Isaac Shorr* was on the briefs, for appellant.

Mr. George Ross Hull, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Bilokumsky is said to have entered the United States in 1912. In May, 1921, he was arrested in deportation proceedings upon a warrant of the Secretary of Labor as being an alien within the United States in violation of law. The specific ground was having in his possession for the purpose of distribution printed matter which advocated the overthrow of the Government of the United States by force or violence. Act of October 16, 1918, c. 186, §§ 1 and 2, 40 Stat. 1012, as amended June 5, 1920, c. 251, 41 Stat. 1008. After a hearing, granted to enable him to show cause why he should not be deported, a warrant of deportation issued. While in the custody of the

Commissioner of Immigration at the Port of New York, he filed in the federal court this petition for a writ of *habeas corpus*. That court heard the case upon the return and a traverse thereto; dismissed the writ; remanded the relator to the custody of the Commissioner; allowed an appeal; and stayed deportation until further order. The case is here under § 238 of the Judicial Code, the claim being that the relator was denied rights guaranteed by the Fourth and Fifth Amendments to the Federal Constitution.

Prior to the application for the warrant of arrest in the deportation proceedings, Bilokumsky was confined to Moyamensing Prison, Philadelphia, on charges made by city authorities that he had violated the state sedition law. While there he was sworn and interrogated by an immigration inspector who took a stenographic report of the examination. In answer to questions so put he admitted that he was an alien, but denied that he had done anything which rendered him liable to deportation. There is nothing in the examination which suggests that Bilokumsky made his statement because of threats or promises of favor; and there was no evidence that the statement was an involuntary one, unless compulsion is to be inferred from the fact that he was at the time in custody; that city and federal authorities were then cooperating "with a view to ridding this country of undesirables"; that the prosecution under the state law was dropped soon after the institution of the deportation proceedings; that he was not then represented by counsel; and that he was not apprised by the inspector, either that he was entitled to be so represented or that he was not obliged to answer.

At the hearing under the warrant of the Secretary of Labor all facts necessary to establish that Bilokumsky had in his possession for purpose of distribution printed matter which advocated the overthrow of the Govern-

ment were proved by evidence to which there was no objection. To prove alienage the inspector called Bilokumsky as a witness. He was sworn; but when questioned by the immigration inspector, under advice of counsel, stood mute, refusing even to state his name. After his refusal to answer, the report of his examination in Moyamensing Prison was introduced, although duly objected to by counsel. He did not testify on his own behalf; nor did he, or his counsel, make the claim, at the hearing, that he is a citizen of the United States. The rules then in force dealing with the conduct of such hearings are copied in the margin.[1] So far as appears these were fully complied with. It is conceded that, if the fact of alienage was legally established, there was both probable cause for issuing the original warrant of arrest and ample evidence at the hearing to justify a finding that relator was within the United States in violation of law. The contention is that there was no legal evidence of alienage.

If, in the deportation proceedings, Bilokumsky had claimed that he was a citizen and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal. *Ng Fung Ho* v.

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[1] "Rule 22, Subd. 5(a). Upon receipt of a telegraphic or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. If the alien is unable to speak or understand English, an interpreter should be employed where practicable."

"Rule 22, Subd. 5(b). At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing." Compare *Colyer* v. *Skeffington*, 265 Fed. 17, 46.

White, 259 U. S. 276, 281. But he made no such claim at that time; nor does he now contend, by allegation in his petition for *habeas corpus,* or otherwise, that he is a citizen of the United States. He rests his claim to relief on an entirely different ground. He asserts that, because of the manner in which the evidence of alienage was procured, the warrant of deportation is a nullity. He argues that alienage is essential to jurisdiction; that the Government has the burden of establishing the fact; that it can be established only by legal evidence; that his examination while in prison is the only evidence introduced for that purpose; that its procurement involved both an unlawful search and seizure and a violation of the rules of the Department; that since it was illegally procured it was not legal evidence; and, hence, that the order is void. Its nullity is urged on three grounds. Because the order is unsupported by legal evidence; because the hearing was unfair; and because the original warrant issued without probable cause.

It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. *United States* v. *Sing Tuck,* 194 U. S. 161, 167. It is true that the burden of proving alienage rests upon the Government. For the statutory provision which puts upon the person arrested in deportation proceedings the burden of establishing his right to remain in this country applies only to persons of the Chinese race. See *Ng Fung Ho* v. *White, supra,* p. 283. (Compare Immigration Rules of May 1, 1917, Rule 8.) It is also true that if the Department makes a finding of an essential fact which is unsupported by evidence, the court may intervene by the writ of *habeas corpus. Zakonaite* v. *Wolf,* 226 U. S. 272, 274–5. But it is not true that, if the report of Bilokumsky's examination be eliminated, there was no evidence of alienage at the hearing. Conduct which forms a basis for inference is evidence. Silence

is often evidence of the most persuasive character. *Runkle* v. *Burnham*, 153 U. S. 216, 225; *Kirby* v. *Tallmadge*, 160 U. S. 379, 383. Compare *Quock Ting* v. *United States*, 140 U. S. 417, 420. Bilokumsky was present at the hearing, personally and by counsel. The ground for deportation involved a charge of acts which might have been made the basis of a serious criminal prosecution. Criminal Code, § 6. If Bilokumsky was a citizen, inquiry into the facts was immaterial; and the whole proceeding must have fallen. He, presumably, knew whether or not he was a citizen. Since alienage is not an element of the crime of sedition, testifying concerning his status could not have had a tendency to incriminate him. There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien.

Conduct is often capable of several interpretations; and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. Deportation proceedings are civil in their nature. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591. Neither statute nor rule requires that matter alleged in the warrant of arrest shall, in the absence of an express admission, be taken to be denied. A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute. It is not unreasonable to assume that one who may wish to challenge the executive's jurisdiction in the

courts will not refrain from asserting in the proceedings before the executive the facts on which he relies. To defeat deportation it is not always enough for the person arrested to stand mute at the hearing and put the Government upon its proof. Compare *United States* v. *Sing Tuck,* 194 U. S. 161, 169. Since the proceeding was not a criminal one, Bilokumsky might have been compelled by legal process to testify whether or not he was an alien.[2] The Government was not obliged to adopt that course.

The introduction of Bilokumsky's examination as evidence did not render the hearing unfair. The specific grounds urged for holding it so are that the evidence was obtained by an illegal search and seizure and in violation of the rules of the Department. Both contentions are unfounded. It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings. Compare *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298. But mere interrogation under oath by a Government official of one lawfully in confinement is not a search and seizure. It may be assumed that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.[3] But no rule is shown which prohibits interrogation without apprising the person under investigation that he is entitled to refuse to answer

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[2] See *United States* v. *Hung Chang,* 134 Fed. 19; *Low Foon Yin* v. *United States,* 145 Fed. 791; *Law Chin Woon* v. *United States,* 147 Fed. 227; *Tom Wah* v. *United States,* 163 Fed. 1008; *In re Chan Foo Lin,* 243 Fed. 137, 140; *United States* v. *Brooks,* 284 Fed. 908, 910. Act of Feb. 5, 1917, c. 29, § 16, 39 Stat. 874.

[3] Compare *Whitfield* v. *Hanges,* 222 Fed. 745, 749; *Jouras* v. *Allen,* 222 Fed. 756, 758; *Mah Shee* v. *White,* 242 Fed. 868, 871; *Lum Hoy Kee* v. *Johnson,* 281 Fed. 872; *Sibray* v. *United States,* 282 Fed. 795, 797; *Ex parte Low Joe,* 287 Fed. 545; *United States* v. *Dunton,* 288 Fed. 959.

and to have counsel. The examination here complained of was conducted before there was an application for the warrant of arrest. There is neither in Rule 22, subdivision 3, which relates to the application for a warrant,[4] nor elsewhere in the rules, any provision which deals with interrogation prior to the hearing. Rule 22, subdivision 5(a) and (b), apply only to the proceedings after an arrest has been made. The careful provision which the rules make to ensure to the person arrested the benefit of counsel and access to the Government's evidence at the hearing leads to the conclusion that the omission of any similar provision governing earlier stages in the proceeding was intentional. In the absence of a rule forbidding interrogation, or requiring the presence of counsel, mere examination in his absence does not render the hearing unfair. *Low Wah Suey* v. *Backus,* 225 U. S. 460, 470.

It is urged that the admission of Bilokumsky's examination renders the hearing unfair because it is inconsistent with fundamental principles of justice embraced within the conception of due process of law. The argument is that if a judgment of deportation is to rest upon admissions attributable to the person to be deported, the admissions must have been made by him as a free agent and under circumstances which raise no doubt whether they were in fact made. Deportation is a process of such serious moment that on all controverted matters the executive officers should consider the evidence with close scrutiny. But here there was no denial of alienage; and a landing certificate was introduced by the Government which, when connected with the statement in Bilokum-

[4] "Rule 22, Subd. 3. *Application for warrant of arrest.*—The application must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence."

sky's examination, tended in some respects to corroborate it. Moreover, the statement that one is an alien is not the confession of a crime. Except in case of Chinese, or other Asiatics, alienage is a condition, not a cause, of deportation. So far as appears, there was nothing in the circumstances under which Bilokumsky was examined which would have rendered his answer inadmissible even in a criminal case. The mere fact that it was given while he was in confinement would not make it so.[5] And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application. *Newhall* v. *Jenkins,* 2 Gray, 562, 563. Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received.[6] *Tang Tun* v. *Edsell,* 223 U. S. 673, 681. To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process. *Chin Yow* v. *United States,* 208 U. S. 8; *Kwock Jan Fat* v. *White,* 253 U. S. 454, 459. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91.

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[5] *Hopt* v. *Utah,* 110 U. S. 574, 585; *Sparf and Hansen* v. *United States,* 156 U. S. 51, 55; *Pierce* v. *United States,* 160 U. S. 355, 357; *Wilson* v. *United States,* 162 U. S. 613, 623; *Hardy* v. *United States,* 186 U. S. 224, 228–230. Compare *Powers* v. *United States,* 223 U. S. 303.

[6] Compare *United States* v. *Uhl,* 215 Fed. 573, 574, 576; *Choy Gum* v. *Backus,* 223 Fed. 487, 492–3; *Sibray* v. *United States,* 227 Fed. 1, 7; *United States* v. *Uhl,* 266 Fed. 34, 39; *United States* v. *Uhl,* 266 Fed. 646; *Morrell* v. *Baker,* 270 Fed. 577; *United States* v. *Uhl,* 271 Fed. 676, 677; *Chin Shee* v. *White,* 273 Fed. 801, 805; *United States* v. *Wallis,* 279 Fed. 401, 403; *Moy Yoke Shue* v. *Johnson,* 290 Fed. 621.

What has been said disposes also of the broader contention that the whole deportation proceeding was void *ab initio,* because without the report of Bilokumsky's examination there was lacking probable cause for issuance of the warrant of arrest. Irregularities on the part of the Government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law. "A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 662; *Iasigi* v. *Van de Carr,* 166 U. S. 391; *Stallings* v. *Splain,* 253 U. S. 339, 343.

Affirmed.

DAVIS, AS AGENT OF THE PRESIDENT, ETC. *v.* SLOCOMB, ADMINISTRATRIX OF SLOCOMB.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 530. Motion to dismiss submitted October 1, 1923.—Decided November 12, 1923.

1. An action for death by negligence, though based on a state statute, is an action arising under the laws of the United States when brought against the Director General of Railroads under § 10 of the Federal Control Act or against the Agent designated as his substitute under the Transportation Act, 1920. P. 160.
2. But, because of the provision of the Federal Control Act forbidding transfer to a federal court of any action not so transferable prior to the federal control, an action against the Director General was not removable to the District Court upon the ground that it arose under that act. P. 160.

3. And the same limitation exists, by implication, when the action is brought against the Agent appointed under the Transportation Act, though the latter act contains no provision relating to removal of causes. P. 161.
4. Where the only ground for removal of an action against the Agent was diversity of citizenship, a judgment of the Circuit Court of Appeals affirming a recovery in the District Court is not reviewable here by writ of error under Jud. Code, § 241. *Id.*

Writ of error to review 288 Fed. 352, dismissed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the plaintiff in an action for death caused by negligence of a railway under federal control.

Mr. Arthur E. Griffin, for defendant in error, in support of the motion. *Mr. William Martin* was also on the brief.

Mr. F. G. Dorety and *Mr. Edwin C. Matthias,* for plaintiff in error, in opposition to the motion. *Mr. Thomas Balmer* was also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought in 1921 by a citizen of Washington in a court of that State to recover, under a state statute, for death caused by the negligence of the Great Northern Railway while under federal control. The Government had surrendered possession February 28, 1920. The Railway, a Minnesota corporation, and James Cox Davis, as agent designated by the President pursuant to § 206*a* of Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, were made defendants. Removal to the federal court was prayed for, and granted, on the ground of diversity of citizenship and also on the ground that the suit was one arising under the laws of the United States. The District Court ordered that the suit be dismissed as against the Railway; and later entered judgment

against Davis. That judgment was affirmed by the Circuit Court of Appeals and is brought here by writ of error under § 241 of the Judicial Code. Respondent moves to dismiss the writ of error on the ground that under § 128 the judgment below is final.

The cause of action for a death was created by state statute. But the case is one arising under the laws of the United States; for it is only by reason of the federal law that any suit may be brought against this defendant. *Sonnentheil* v. *Moerlein Brewing Co.*, 172 U. S. 401, 404–5; *Matter of Dunn*, 212 U. S. 374. The amount in controversy exceeds one thousand dollars besides costs. The ground of removal set out in the petition is both diversity of citizenship and that the case arises under federal law. It may, therefore, be brought here under § 241 (*Southern Pacific Co.* v. *Stewart*, 245 U. S. 359, 562), unless the case is one of those arising under federal law in which Congress has denied the right of removal to the federal court, and/or is one of those so arising in which the judgment of the Circuit Court of Appeals has been made final. The question presented is one of construction.

The right to sue the Government for injuries arising under federal control rests on § 10 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451. *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554. That section provides that "Actions at law . . may be brought by and against such carriers . . as now provided by law;" but that there shall not be "transferred to a Federal court any action . . which . . was not so transferable prior to the Federal control." Therefore, if, during federal control, this suit had been begun against the Director General he could not have removed it to the federal court on the ground that it is a suit arising under the laws of the United States; and, since the jurisdiction of the District Court would have rested wholly on diversity of citizenship, the

judgment of the Circuit Court of Appeals would have been final. Upon the termination of federal control it was necessary to make provision for suits then pending, and also for such as might thereafter be brought based on causes of action arising during the period of operation by the Government. This was done in Transportation Act 1920, by § 206, subdivisions *a*, *b*, *c*, *d*, and *f*, which provide, among other things, that an agent to be designated by the President shall be substituted for the Director General in suits then pending; and that the agent shall be made the defendant in suits thereafter commenced. That act contains no provision relating to the removal of causes to the federal courts. There is no reason to suppose that Congress intended to make a change in this respect and give the right of removal in suits then pending, merely because the representative of the Government was, after February 28, 1920, to be designated agent and to have limited powers, instead of being the Director General who possessed broad powers. Nor is any reason suggested why Congress should have desired to confer upon such agent larger rights of removal, or of review by this Court, than had been enjoyed theretofore by the Director General. In the absence of specific provision to that effect we must assume that Congress intended to leave the law unchanged.

The only ground for removal in this case was diversity of citizenship. Hence the judgment of the Circuit Court of Appeals is final.

Writ of error dismissed.

BUTTERS ET AL. *v.* CITY OF OAKLAND ET AL.

ERROR TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT.

No. 16. Submitted October 3, 1923.—Decided November 12, 1923.

1. Where a state statute authorizes municipal authorities to define the district to be benefited by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, after due hearing of the owners as required by the statute, when not arbitrary or fraudulent, cannot be reviewed under the Fourteenth Amendment upon the ground that other property benefited by the improvement was not included and taxed. P. 164.
2. The fact that a city council, in revising public improvement assessments upon appeal, reduced those laid on certain areas and made up the amount of the reduction by distributing it over and assessing it upon the entire district, does not in itself establish that an assessment thus increased was, to the extent of the increase, arbitrary and not according to benefits. P. 165.
3. The California Improvement Act of 1911, as construed by the state Supreme Court, while authorizing collection of street improvement taxes, does not interfere with the taxpayer's right to compensation for damages caused to his abutting property by a change of grade, or his right to enjoin the doing of the work until such damages have been ascertained and paid. P. 166.
4. The theoretical possibility that improvement taxes laid in proportion to estimated benefits may be greater than the benefits to be actually received by land so taxed, is not enough to overturn this established method of assessment. P. 166.

53 Cal. App. 294, affirmed.

ERROR to a judgment of the District Court of Appeal of California, which affirmed a judgment against the present plaintiffs in error in their suit to enjoin the defendants from making or recording an assessment of street improvement taxes against the plaintiffs' properties.

Mr. C. Irving Wright and *Mr. J. E. Manders* for plaintiffs in error. *Mr. F. E. Boland* was also on the brief.

Mr. James A. Johnson for defendants in error. *Mr. George M. Shaw* and *Mr. R. M. F. Soto* were also on the brief.

Mr. Justice Sutherland delivered the opinion of the Court.

Plaintiffs in error brought suit to restrain the defendants from making or recording an assessment of improvement taxes against plaintiffs' properties, made under the provisions of the Improvement Act of 1911, California Statutes, 1911, pp. 730–769. The improvement consists of certain street grading in the City of Oakland, together with various structures, such as culverts, etc., in connection therewith.

The authority to order such improvements is vested by the statute in the City Council, which, before making an order, must pass a resolution of intention to do so, setting forth specified details. In a case such as is here presented, the Council may delimit the district to be benefited and make the expense chargeable upon it. Public notice of the contemplated improvement is to be given, and, within stated times thereafter, the owner of any assessable property may protest in writing against either the proposed work or the extent of the district to be assessed, or both. Such protest must be heard and passed upon by the Council and "its decision shall be final and conclusive." If the protest be denied, the Council may order the proposed improvement. Provision is made for inviting bids and awarding and making contracts therefor and for reviewing the proceedings at the instance of any interested person. Where the cost of the improvement is to be assessed against a district, diagrams of the property benefited must be made, showing each separate lot, piece or parcel of land, its area, relative location, etc. Thereupon the Superintendent of Streets must estimate the benefit to be received by each of such parcels of land

" in proportion to the estimated benefits to be received by each," and thereafter an assessment to cover the same is made. Any person interested may appeal to the City Council in respect of these and prior proceedings, including the question of the correctness or legality of the assessment. The decision of the City Council thereon is made final and conclusive as to all persons entitled to appeal.

The trial court found the issues of fact and of law against plaintiffs and entered judgment accordingly, which was affirmed by the Court of Appeal for the First Appellate District, 53 Cal. App. 294. A petition to have the cause heard in the state Supreme Court was denied, and it comes here by writ of error to the District Court of Appeal. The federal question raised in the court below and presented here is that the state statute and the assessment against plaintiffs' properties offend against the Federal Constitution in that the one arbitrarily authorizes and the other arbitrarily imposes a tax upon plaintiffs' properties for a local improvement in excess of the benefits received and without providing for resulting damages, and thereby they are deprived of their property without due process of law, in violation of the Fourteenth Amendment. Several grounds are urged in support of this contention, which we consider in their order.

1. Plaintiffs in error contend that the assessment was not in proportion to the benefits because certain property, also benefited by the improvement, was omitted from the district. Without reviewing the circumstances said to establish this contention, it is enough to say that the municipal authorities were empowered to establish the district benefited and to assess the tax in proportion to the benefits. Ample provision is made for a hearing and a hearing was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or

fraudulently. The assessment was reviewed upon appeal by the City Council, and that body, after a hearing, altered it in some particulars, and caused a new warrant of assessment to be issued. Its action, under the statute, was final and conclusive and is not open to attack in this proceeding. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 167–170, 175; *Hibben* v. *Smith*, 191 U. S. 310, 321–323; *Jelliff* v. *Newark*, 48 N. J. L. 101, 109; *Embree* v. *Kansas City, &c. Road District*, 240 U. S. 242, 247–249.

2. Upon review by the City Council deductions were made from the amounts assessed upon certain areas included within the district and a sum equal to the aggregate thereof was distributed over and assessed upon the entire district, resulting in some increase in the assessment upon plaintiffs' properties. It is urged that this establishes, to the extent of the increase, that the assessment was arbitrary, and not according to benefits. The Supreme Court of California in another case, involving the same assessment, has held otherwise. *Rockridge Place Co.* v. *City Council*, 178 Cal. 58, 62–63. The whole matter seems to have been fully heard and carefully considered by the City Council and its adjustment upon the basis that the assessment upon some property within the district was too high and that upon the remainder too low cannot be upset merely because the aggregate amount deducted from the one coincides with that applied upon the other, since the Council, after a full hearing, expressly found that the assessment as finally made was in accordance with the benefits. It is impossible for us to say that the property assessed did not receive an additional benefit to the extent of the amount thus proportionately distributed. The determination of the Council is so largely a matter of opinion, that, in the absence of convincing evidence of error it will not be disturbed. See *Jelliff* v.

Newark, supra; Walker v. *City of Aurora,* 140 Ill. 402, 411; *Sanitary District* v. *Joliet,* 189 Ill. 270, 272; *State, Pudney, pros.,* v. *Village of Passaic,* 37 N. J. L. 65, 67–68.

3. Plaintiffs insist that the order directing the improvement in question is invalid because no provision is made for the ascertainment and adjustment of damages occasioned to abutting owners by a change of grade. As construed by the state Supreme Court the statute simply authorizes the collection of the assessment, but does not interfere with the right of a taxpayer whose property may be injured thereby to receive compensation or to enjoin the doing of the work until it is ascertained and paid. 53 Cal. App. 299; *Wilcox* v. *Engebretsen,* 160 Cal. 288, 298–299. We must accept this construction. Two of the plaintiffs, in fact, availed themselves of this remedy and recovered damages against the City.

4. The statute provides that the expense of the work may be chargeable upon the district which the City Council declares to be benefited by the improvement, and that such cost shall be assessed upon the several lots in the district "in proportion to the estimated benefits to be received by each"; and it is urged by plaintiffs that the cost may exceed the benefits, in which event the proportionate assessment of the estimated benefits may, in fact, be greater than the actual benefits received. We are not impressed with this contention. It is not unreasonable to assume that ordinarily the cost of street grading and paving, within municipalities such as this statute deals with, will not exceed the benefits which the adjoining land owners will receive, and it is neither alleged nor proven that it has in fact done so in the present case. The method of assessment provided for is an old and familiar one and embodies a principle too well established to be overturned by the suggestion of a theoretical possibility that there may not be an exact and mathematical relation between cost and benefit in particular instances. See

Louisville & Nashville R. R. Co. v. *Barber,* 197 U. S. 430, 433–434; *Martin* v. *District of Columbia,* 205 U. S. 135, 138–140.

Affirmed.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* HURNI PACKING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 66. Argued October 11, 1923.—Decided November 12, 1923.

1. In case of ambiguity in a life insurance policy, that construction is to be adopted which is most favorable to the insured. P. 174.
2. The word "date," as applied to a written instrument, signifies primarily the time specified therein. P. 174.
3. Where a life insurance policy declared that it should be incontestable, except for nonpayment of premiums, provided two years should have elapsed "from its date of issue," *held,* that the date intended was the one specified in the policy, although this (by agreement of the parties) was earlier than the dates of actual execution and delivery. P. 175.
4. A provision of a life insurance policy that it shall be incontestable after a specified period from its date of issue inures to the beneficiary of the policy, and applies where the period elapses after the death of the insured. P. 176.

280 Fed. 18, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals, which affirmed a judgment of the District Court for the plaintiff, the present respondent, in an action to recover the amount of a life insurance policy.

Mr. James M. Beck, with whom *Mr. Frederick L. Allen, Mr. Ralph L. Read,* and *Mr. Guy T. Struble* were on the brief, for petitioner.

I. The policy was void for fraud.

II. The two-year contestable period commenced to run either on September 7, 1915, when the policy was actually

executed, or on September 13, 1915, when it was delivered and took effect.

The application provides: "The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health." The commencement of the running of the two-year contestability period is expressly stated as the date of issue of the policy. Thus the date of issue is specifically differentiated in the policy itself from the date of the policy.

For the general meaning of the word "issue," see dissenting opinion of Sanborn, J., in this case. Also *Homestead Ins. Co.* v. *Ison,* 110 Va. 18; *Maggett* v. *Roberts,* 112 N. C. 71; *Coleman* v. *New England Life Ins. Co.,* 236 Mass. 552; *McMaster* v. *New York Life Ins. Co.,* 183 U. S. 25.

When the parties to this contract were negotiating, they knew that the date which was to be recited in the policy was to be a fictitious date and not the real date of execution. They also knew that the policy could not be "issued" on that fictitious date because it already had passed. The application was not made until September 2, 1915. The policy had to be executed at the home office of the Company in New York, and was so executed there on September 7, 1915. It then had to be forwarded to Sioux City, Iowa, for delivery, and it was forwarded and was delivered September 13, 1915. Then and only then it became a binding contract. Both parties had agreed that the policy should not be in force and its obligations and limitations would not begin until it was delivered and the first premium paid. It therefore was agreed that the nominal date of the policy should be anterior to the "date of issue." It never was agreed that such date of issue should be the same as a fictitious

date of the policy. Such an agreement would have been impossible of fulfillment because obviously the policy could not be issued on August 23, 1915, that date being more than one week prior to the date it was applied for.

The incontestability clause, limiting as it does the right of the Company to contest its liability under the policy on the ground of fraud, is a self-imposed limitation of right, for the benefit of the insurer. It should not, therefore, be so construed as to inflict a greater limitation on the rights of the Company to defend itself against a fraud than clearly arises from the plain wording and meaning of the clause itself.

Where a contract is valid, there is reason for holding that, as the insurer dictates the terms of the contract, any fair doubt should be resolved in favor of the insured. But does this rule apply with equal force, where the entire contract, including the incontestability provision, is void by reason of the fraud of the insured in procuring the contract? Does public policy require that, where the defense to the policy is that it is void on the ground of fraud, a clause of the void contract, which limits the power to prove the fraud, should be construed against the insurer and in favor of the insured?

Conceding *arguendo* that the incontestability provision must be construed as favorably to the insured as any other executory clause, this rule does not require an unreasonable construction, which would facilitate a fraud.

The fair and unmistakable intention of the parties was that, when the Company assumed responsibility, it should have two full years thereafter to determine whether the insured had practiced any fraud upon the insurer. To reduce this limitation by dating it from an anterior and fictitious date not only reduces the two years which the parties manifestly had in mind, but it might altogether destroy such right of rescission, as it would if the limitation had been only six months from the date of issue, and the

policy had been dated back six months from the time of its actual execution.

By construing the "date of issue" to mean either the date of actual execution, or the date of delivery, when the policy by its terms took effect, and not the fictitious date of execution, each expression is given its rational meaning and the provisions are accordant and harmonious.

III. The death of the insured matured the policy; the rights of the parties became fixed then; and the incontestability clause could not become operative.

There are state authorities holding that such a clause is applicable notwithstanding the policyholder may die before the expiration of the contestability period. We contend that the insured must have lived until the expiration of the period in order to make the policy incontestable. *Jefferson Standard Life Ins. Co.* v. *Smith,* 157 Ark. 499; *Jefferson Standard Life Ins. Co.* v. *McIntyre,* 285 Fed. 570.

The rule that death of the insured stops the running of the contestability period is a necessary implication of the decisions of this Court in *Cable* v. *United States Life Ins. Co.,* 191 U. S. 288, and *Phoenix Ins. Co.* v. *Bailey,* 13 Wall. 616, holding that after death the insurance company cannot bring a suit in equity to rescind for fraud, for the reason that it has a plain, adequate and complete remedy at law by setting up the fraud as a defense in the law action. This rule has been followed in *Griesa* v. *Mutual Life Ins. Co.,* 169 Fed. 509; and *Riggs* v. *Union Life Ins. Co.,* 129 Fed. 207. See also Jud. Code, §§ 267 and 274b. If the insurance company must wait until the action at law is commenced, and assert its defense of fraud in that action, and such remedy is plain, adequate and complete, the rule must rest upon the fact that the rights of both insurance company and beneficiary are fixed by the maturing of the policy through the death of the insured.

There is no doubt that in numerous cases, in both federal and state courts, the question was involved but passed over *sub silentio.* See *Aetna Life Ins. Co.* v. *Moore,* 231 U. S. 543; *Prudential Ins. Co.* v. *Moore,* 231 U. S. 560. An examination of the records in these cases discloses no evidence of any extra-judicial "contest" before the one-year contestability period expired.

The incontestability clause cannot always be given a strictly literal construction in order to fix the date when the contestability period expires. Otherwise, it would often operate to terminate a litigation in the very midst of a trial. Such construction ignores the fundamental fact that, in case of a life insurance policy, the death of the insured is the crucial and decisive fact determining the rights and duties of the contracting parties.

There are many cogent reasons why it may be said that it is the intention of the parties to the contract of insurance that the insured must live two years in order to make the incontestability clause applicable. Against these there can be advanced no reason except that, generally speaking, a policy will be construed, in case of an ambiguity, against the insurance company and in favor of the claimant.

The main error in the decisions of some state courts, which hold the incontestability clause applicable notwithstanding the death of the insured during the contestability period, is in failing to differentiate between the policy of insurance, as such, and the obligation arising therefrom between the claimant and the insurance company after the death of the insured. A contract of insurance necessarily imports, among other things, a so-called "risk." After the insured is dead the contract is no longer one of insurance, but of payment, if the policy is valid. See *Mellen* v. *Hamilton Fire Ins. Co.,* 17 N. Y. 609.

By the incontestability clause the insurance company undertakes that, provided it continues to insure against

the risk for a period of two years after the policy is issued, thereafter it will make no defense against a claim under the policy. It is therefore obvious that the risk must continue for the period of two years.

To state the proposition another way: The insurance company limits its right to cancel or rescind the policy for any reason whatsoever, except for the nonpayment of premiums, to a period of two years, provided the policy exists as a policy of insurance for that time. After two years have elapsed from the date of issue, the policy cannot be rescinded except for the nonpayment of premiums; and in the event of the death of the insured after two years, the obligation to pay becomes absolute. It is obvious that the insurance company intended to reserve to itself the privilege of investigation to determine whether or not it desired to continue the risk. The period of time during which it might investigate is limited to two years. If the insured dies before the two-year period of contestability (and incidentally the period wherein investigation could be made), the insurance company would not be able to make as full and complete an investigation as if the insured were alive and able perhaps to answer questions or be under observation. Moreover the company can neither begin suit nor give notice of rescission until legal representatives are appointed for the deceased insured.

There never was a contract with the beneficiary that the policy should ever be incontestable. There was a contract with the insured that the policy should be incontestable provided the contract relationship between the insured and the insurance company continued during the lifetime of the insured for the period of two years. This construction of the contract is much the more reasonable and just.

IV. Notice by the insurance company denying liability on the policy was a "contest" and prevents the assertion of an estoppel under the incontestability clause.

Mr. Charles M. Stilwill and *Mr. Edwin J. Stason,* for respondent, submitted.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action to recover the amount of a life insurance policy issued by the petitioner to Rudolph Hurni. At the conclusion of the evidence the jury found for the plaintiff, respondent here, under the peremptory instruction of the court, and judgment was rendered accordingly. Upon appeal this judgment was affirmed by the Court of Appeals. 280 Fed. 18.

There were two trials below. Upon appeal following the first, the Court of Appeals reversed a judgment in favor of plaintiff on the ground of material misrepresentation by the insured. 260 Fed. 641. Pending the second trial plaintiff amended its reply to the answer and alleged for the first time that this defense was barred, under the terms of the policy, by defendant's failure to contest within two years.

The policy was applied for on September 2, 1915. It was in fact executed on September 7th but antedated as of August 23, 1915, and was delivered to insured about September 13th. The insured died on July 4, 1917.

The application provides that "the applicant upon request may have the policy antedated for a period not to exceed six months." Underneath the heading of the application there was written the direction: "Date policy August 23, 1915; age 47." The testimonium clause, followed by the signatures of the officials, reads: "In Witness Whereof, the company has caused this policy to be executed this 23rd day of August, 1915." The policy acknowledges the receipt of the first premium and provides that a like amount shall be paid "upon each 23rd day of August hereafter until the death of the insured."

The determination of the case depends upon the meaning of a clause in the policy as follows: "Incontestability. This policy shall be incontestable, except for non-payment of premiums, provided two years shall have elapsed from its date of issue." The trial court held that the words "its date of issue" were to be construed as referring to the date upon the face of the policy, viz: August 23, 1915; and this was also the view of the Court of Appeals. The first action taken by the Insurance Company to avail itself of the misrepresentation of the insured was on the 24th day of August, 1917, one day beyond the period of two years after the conventional date of the policy. It is contended on behalf of the Insurance Company: (1) That the period of incontestability did not begin to run until the delivery of the policy, or, in any event, until its actual execution on September 7th; and (2) That the policy was matured by the death of the insured, and the rights of the parties thereby became fixed so that the incontestability clause never became operative, even within the conventional limitation.

First. The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it. *First National Bank* v. *Hartford Fire Insurance Co.*, 95 U. S. 673, 678–679; *Thompson* v. *Phenix Insurance Co.*, 136 U. S. 287, 297; *Imperial Fire Insurance Co.* v. *Coos County*, 151 U. S. 452, 462.

The word "date" is used frequently to designate the actual time when an event takes place, but, as applied to written instruments, its primary signification is the time specified therein. Indeed this is the meaning which its derivation (*datus*=given) most naturally suggests. In *Bement & Dougherty* v. *Trenton Locomotive, &c., Co.*,

32 N. J. L. 513, 515–516, it is said: "The primary signification of the word *date,* is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time *given* or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item, or of a charge in a book account, is not necessarily the time when the article charged was, in fact, furnished, but simply the time given or set down in the account, in connection with such charge." This language was used in construing a provision of the New Jersey lien law to the effect that no lien should be enforced unless summons be issued "within one year from the date of the last work done, or materials furnished, in such claim"; and, specifically applying it to that provision, the court concluded: "And so 'the date of the last work done, or materials furnished, in such claim,' in the absence of anything in the act indicating a different intention, must be taken to mean the time when such work was done or materials furnished, as specified in plaintiffs' written claim."

Here the words, referring to the written policy, are "from its date of issue." While the question, it must be conceded, is not certainly free from reasonable doubt, yet, having in mind the rule first above stated, that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of actual execution of the policy or the time of its delivery but to the date of issue as specified in the policy itself. *Wood* v. *American Yeoman,* 148 Iowa, 400, 403–404; *Anderson* v. *Mutual Life Insurance Co.,* 164 Cal. 712; *Harrington* v. *Mutual Life Insurance Co.,* 21 N. D. 447; *Yesler* v. *Seattle,* 1 Wash. 308, 322–323. It was competent for the parties to agree that the effective

date of the policy should be one prior to its actual execution or issue; and this, in our opinion, is what they did. Plainly their agreement was effective to govern the amount of the premiums and the time of their future payment, reducing the former and shortening the latter, and, in the absence of words evincing a contrary intent, we are unable to avoid the conclusion that it was likewise effective in respect of other provisions of the policy, including the one here in question. This conclusion is fortified by a consideration of the precise words employed, which are "from *its* [that is, the policy's] date of issue;" or, in other words, from the date of issue as specified in the policy. It was within the power of the Insurance Company if it meant otherwise, to say so in plain terms. Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it.

Second. The argument advanced in support of the second ground relied upon for reversal, in substance, is that a policy of insurance necessarily imports a risk and where there is no risk there can be no insurance; that when the insured dies what had been a hazard has become a certainty and that the obligation then is no longer of insurance but of payment; that by the incontestability clause the undertaking is that after two years, provided the risk continues to be insured against for the period, the insurer will make no defense against a claim under the policy; but that if the risk does not continue for two years (that is, if the insured dies in the meantime) the incontestability clause is not applicable. Only in the event of the death of the insured after two years, it is said, will the obligation to pay become absolute. The argument is ingenious but fallacious, since it ignores the fundamental purpose of all simple life insurance, which is not to enrich the insured but to secure the beneficiary, who has, therefore, a real, albeit sometimes only a contingent, interest in the policy.

It is true, as counsel for petitioner contends, that the contract is with the insured and not with the beneficiary but, nevertheless, it is for the use of the beneficiary and there is no reason to say that the incontestability clause is not meant for his benefit as well as for the benefit of the insured. It is for the benefit of the insured during his lifetime and upon his death immediately inures to the benefit of the beneficiary. As said by the Supreme Court of Illinois in *Monahan* v. *Metropolitan Life Ins. Co.*, 283 Ill. 136, 141: "Some of the rights and obligations of the parties to a contract of insurance necessarily become fixed upon the death of the insured. The beneficiary has an interest in the contract, and as between the insurer and the beneficiary all the rights and obligations of the parties are not determined as of the date of the death of the insured. The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured as much as it inures to the benefit of the insured himself during his lifetime. The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured."

In order to give the clause the meaning which the petitioner ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue;—not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event. See *Monahan* v. *Metropolitan Life Ins. Co., supra; Ramsey* v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 601; *Ebner* v. *Ohio State Life Ins. Co.*, 69 Ind. App., 32, 42–48; *Hardy* v. *Phoenix Mutual Life Ins. Co.*, 180 N. Car. 180, 184–186.

Counsel for petitioner cites two cases which, it is said, sustain his view of the question: *Jefferson Standard Life*

Ins. Co. v. *McIntyre,* 285 Fed. 570, and *Jefferson Standard Life Ins. Co.* v. *Smith,* 157 Ark. 499. But the incontestability clause under review in those cases was unlike the one here. There the clause was: "After this policy shall have been in force for one full year from the date hereof it shall be incontestable," etc. The decisions seem to have turned upon the use of the words "in force," the District Judge in the first case saying: "Are the policies 'in force,' as contemplated in the cause, after the death of the assured occurring prior to one year from the date of the policy? It seems to me that the proper construction of this clause is that it contemplates the continuance in life of the assured during that year; else why except the nonpayment of premiums?" This amounts to little more than a *quaere,* since the question was then dismissed and the case decided upon another ground. We express neither agreement nor disagreement with the construction put by these decisions upon the provision therein considered; but dealing alone with the provision here under review, we are constrained to hold that it admits of no other interpretation than that the policy became incontestable upon the sole condition that two years had elapsed.

Certain difficulties, both legal and practical, said to arise from this interpretation, in respect of the enforcement of the rights of the insurer, are suggested by way of illustration. But these we deem it unnecessary to review. It is enough to say that they do not, in fact, arise in the instant case and they could not arise except as a result of the contract, whose words the Insurance Company itself selected and by which it is bound.

The judgment of the Court of Appeals is

Affirmed.

UNITED STATES *v.* MERRIAM.

UNITED STATES *v.* ANDERSON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 67 and 68. Argued October 11, 12, 1923.—Decided November 12, 1923.

1. A bequest made to an executor, to be in lieu of all compensation or commissions to which he would otherwise be entitled as such, is upon an implied condition that he clothe himself in good faith with the character of executor, but its payment is not conditioned upon actual service in that capacity. P. 184.
2. Bequests of that kind were exempted from tax under the Income Tax Act of October 3, 1913, which taxes "the income from but not the value of property acquired by gift, bequest, devise or descent." *Id.*
3. Taxing statutes are not to be extended by implication beyond the clear import of the language used; and doubt as to the meaning of their words must be resolved against the Government and in favor of the taxpayer. P. 187.

282 Fed. 851, affirmed.

CERTIORARI to judgments of the Circuit Court of Appeals which reversed judgments recovered by the United States in the District Court in actions for additional income taxes.

Mr. Solicitor General Beck, with whom *Mr. Preston C. Alexander* and *Mr. Charles T. Hendler* were on the brief, for the United States.

"Bequest" as well in the terminology of the law as in its general acceptation implies a bounty or gratuity and not a payment; the term is donative and not compensative in its signification. Citing, general and legal lexicographers; Black. Com., (Chase's ed.) p. 609; Schouler on Wills, 5th ed., vol. 1, p. 3; Heaton, Surrogates' Courts, 3d ed., vol. 2, p. 1283; 40 Cyc. 994; *In re Hoover's Estate,*

7 N. Y. S. 283; *In re Daly's Estate,* 89 N. Y. S. 538; *Disston* v. *McClain,* 147 Fed. 114; *Reynolds* v. *Robinson,* 82 N. Y. 103. *Orton* v. *Orton,* 3 Keyes, 486, distinguished.

It is in such sense that "bequest" is used in the Act of 1913. It appears in the act immediately after the word "gift" and before the word "descent", and so, by the rule of *noscitur a sociis,* is to be defined as a gift by will, quite apart from the fact that such is its ordinary meaning. Congress manifestly used the words "bequest, devise, or descent" to mean property given by will or descending by statutes of distribution or descent, as distinguished from property passing for a consideration. The same subparagraph of the act provides that "compensation for personal services in whatever form paid" is taxable income within the act. Contrasting the word "bequest" with these words, should resolve the doubt if any exists. If what is received is "compensation," even though paid in the form of a bequest by will, it is nevertheless taxable income, *a fortiori* when the testator expressly characterizes the bequest as compensation. If, however, it is a donative bequest, as distinguished from "compensation", it is not taxable income.

The statute manifestly does not exempt from taxation income paid in the form of a bequest. The entire net income of the taxpayer is expressly made taxable under paragraph A. The words "but not the value of property received by gift, bequest, devise, or descent" merely point out what is not income. This legislative definition has since been confirmed in *Eisner* v. *Macomber,* 252 U. S. 189, and *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509. Under the definition of income given in those cases a bequest in the nature of a gift is not income, whereas compensation for personal services, though in the form of a bequest, is a gain derived from labor and hence income and clearly taxable under the act.

The bequests to the petitioners "in lieu of all compensation and commissions to which they would otherwise be entitled as executors or trustees" constitute "compensation for personal services" within the meaning of, and as such are taxable as income under, the Act of 1913.

In New York, at the time of decedent's death, compensation to executors and trustees was provided for by § 2753, Code Civ. Proc. In jurisdictions where statutory compensation is provided for, a testator may fix the compensation of his executor or trustee in an amount equal to, greater, or less than, that fixed by law. *Ireland* v. *Corse,* 67 N. Y. 343; *Secor* v. *Sentis,* 5 Redfield Surr. 570; *Connolly* v. *Leonard,* 114 Me. 29; *Lennig's Estate,* 53 Pa. Super. Ct. 596; 24 Corpus Juris, 989.

The respondents did not renounce the so-called bequests within the time limited, and no commissions have been allowed or paid to them, under § 2753, *supra.* Thus they have construed the bequests as testamentary compensation for their services as executors and trustees. If the bequests were not compensation, there would have been no necessity for the filing of renunciations. In that event, however, they would have received large sums by way of statutory commissions, but concedely no commissions were paid them. The reason, of course, is obvious. They were not entitled to commissions—not because by this direction of the testator they were to receive no compensation (*Matter of Vanderbilt,* 68 App. Div. 27), but because the bequests were given to the executors as compensation, and were so recognized by them.

Aside from the foregoing considerations, there can be no question that, under the authorities in this country, the amounts received by the respondents constitute compensation for the personal services to be rendered by them in their capacities of executors and trustees. *Matter of*

Tilden, 44 Hun, 441, 444; *Richardson* v. *Richardson,* 129 N. Y. S. 941; *Accounting of Mason,* 98 N. Y. 527; *O'Donoghue Estate,* 115 Misc. (N. Y.) 697; *Renshaw* v. *Williams,* 75 Md. 498; *Runyon's Estate,* 125 Cal. 195; *In re Hays's Estate,* 183 Pa. St. 296; *Sweatman's Estate,* 223 Pa. St. 552; *Connolly* v. *Leonard,* 114 Me. 29; *Sinnott* v. *Kenaday,* 14 App. D. C. 1; *Batchelder, Petitioner,* 147 Mass. 465; *Fletcher* v. *Hurd,* 14 N. Y. S. 388.

The cases cited in the court below in support of the contention that the bequests to petitioners were donative and not compensative,—*Morris* v. *Kent,* 2 Edw. Ch. 175; *Scofield* v. *St. John,* 65 How. Pr. 292; *Harrison* v. *Rowley,* 4 Ves. Jr. 212; *Angermann* v. *Ford,* 29 Beav. 349; *Lewis* v. *Mathews,* L. R. 8 Eq. 277; and *Brydges* v. *Wotten,* 1 Ves. and Beam. 134,—are distinguishable.

The cases relied upon by respondents are predicated upon the English rule that an executor is not legally entitled to compensation and that any amount given him by will is necessarily a gratuity. The office of executor in New York is not a gratuitous one. Code Civ. Proc., § 2753. The reason for the rule thus fails and with it the rule itself.

Mr. Roy C. Gasser, with whom *Mr. William H. Hayes* was on the brief, for respondents.

Mr. Justice Sutherland delivered the opinion of the Court.

These are actions brought by the United States against the respective defendants, to recover the amount of additional income taxes assessed against them under the Act of October 3, 1913, c. 16, 38 Stat. 114, 166. The pertinent provisions of the statute are:

"A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding

calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of one per centum per annum upon such income. . . .

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent: . . ."

The taxes were assessed upon certain legacies bequeathed to the defendants by the will of the late Alfred G. Vanderbilt. The provisions of the will which give rise to the controversy are as follows:

"Eleventh: I give and bequeath to my brother, Reginald C. Vanderbilt, Five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, Two hundred thousand dollars ($200,000); to Frederick M. Davies, Five hundred thousand dollars ($500,000); to Henry B. Anderson, Two hundred thousand dollars ($200,000); to Frederick L. Merriam, Two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, Ten thousand dollars ($10,000); and to Howard Lockwood, One thousand dollars ($1,000)."

. . . . . .

"Sixteenth: I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vander-

bilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam executors of this my will and trustees of the several trusts created by this my will. . . . The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees."

The defendants qualified as executors and letters testamentary were duly issued to them prior to the commencement of these actions. The legacies were received by the respective defendants during the year 1915,—$250,000 by Merriam and $200,000 by Anderson.

Demurrers to the complaints were overruled by the District Court and judgments rendered against defendants. Upon writs of error from the Court of Appeals these judgments were reversed. 282 Fed. 851. The Government contends that these legacies are compensation for personal service within the meaning of paragraph B, quoted above.

The cases turn upon the meaning of the phrase which describes net income as "including the income from but not the value of property acquired by . . . bequest. . . ." The word "bequest" is commonly defined as a gift of personal property by will; but it is not necessarily confined to a gratuity. Thus, it was held in *Orton* v. *Orton,* 3 Keyes (N. Y.) 486, that a bequest of personal property, though made in lieu of dower, was, nevertheless, a legacy, the court saying: "Every bequest of personal property is a legacy, including as well those made in lieu of dower, and in satisfaction of an indebtedness, as those which are wholly gratuities. The circumstance whether gratuitous or not, does not enter into consideration in the definition. . . . And when it is said that a legacy is a gift of chattels, the word is not limited in its meaning to a gratuity, but has the more extended signification, the primary one given by Worcester in his dictionary, 'a thing given, either as a gratuity or as a recompense."

Without now attempting to formulate a precise definition of the meaning of the word as used in this statute, or deciding whether it includes an amount expressly left as compensation for service actually performed, it is enough for present purposes to say that it does include the bequest here under consideration since, as we shall presently show, actual service as a condition of payment is not required. A bequest to a person as executor is considered as given upon the implied condition that the person named shall, in good faith, clothe himself with the character. 2 Williams on Executors (6th Am. ed.) 1391; *Morris* v. *Kent,* 2 Edwards Chancery, 175, 179. And this is so whether given to him simply in this capacity or for care and trouble in executing the office. *Idem.* And it is a sufficient performance of the condition if the executor prove the will or unequivocally manifest an intention to act. *Lewis* v. *Mathews,* L. R. 8 Eq. Cas. 277, 281; *Kirkland* v. *Narramore,* 105 Mass. 31, 32; *Scofield* v. *St. John,* 65 How. Pr. (N. Y.) 292, 294–296; *Morris* v. *Kent, supra; Harrison* v. *Rowley,* 4 Vesey, 212, 215.

In *Morris* v. *Kent, supra* (p. 179) it is said:

"A legacy to an executor even expressed to be for care and pains, is not to be regarded in the light of a debt or as founded in contract, or to be governed by the principles applicable to contracts. . . . When a legacy is given to a person in the character of executor, so as to attach this implied condition to it, the question generally has been upon the sufficient assumption of the character to entitle the party to the same. The cases establish the general rule that it will be a sufficient performance of the condition, if the legatee prove the will with a bona fide intention to act under it or unequivocally manifest an intention to act in the executorship, as, for instance, by giving directions about the funeral of the testator, but is prevented by death from further performing the duties of his office."

Decisions are cited in the Government's brief which, it is said, establish a contrary rule. These decisions, however, we are of opinion, are clearly differentiated from the case under consideration. Some of them are with reference to testamentary provisions specifically fixing the amount of compensation for services to be rendered while others deal with the question whether the executor is entitled to receive statutory compensation in addition to the amount named in the will. In *Matter of Tilden*, 44 Hun, 441, for example, the will directed that: "In lieu and exclusion of all other commissions and compensation to my executors for performing their duties under this will . . . I authorize them to receive from my estate the following commissions, namely:" The court, construing this provision, said: "The provisions in the will were intended to be as compensation for services rendered, to be in no respect a gift, but an authority to charge for their services a certain sum."

Again, in *Richardson* v. *Richardson,* 129 N. Y. S. 941, the will was interpreted as directing the payment of compensation. Especial stress was laid upon the fact that the will did not purport to "give" or "bequeath" to the executors the amounts fixed, and, adopting the language of the court in the *Tilden Case,* it was said that the provisions of the will were intended as an "'authority to charge for their services a certain sum.' The compensation provided by the will is not a legacy, and does not abate with the legacies, but is compensation, carefully determined by the testator and directed to be paid for the services to be rendered, and is therefore to be paid in full."

It is obvious that in this class of cases the right depends upon the actual performance of the service and the amount fixed is in no sense a legacy but is purely compensative.

In Renshaw v. *Williams*, 75 Md. 498, the court held that where a bequest had been made in lieu of commis-

sions in a sum larger than the commissions would amount to, it must be treated as full compensation for the entire administration of the estate by the same person, though part of it passed through his hands as administrator *pendente lite* and part as executor.

In *Connolly* v. *Leonard,* 114 Me. 29, a devise was made "in lieu of any payment for services as executor or trustee," with the provision that it was so to be accepted and understood. The court held that in view of this language, the executor was not entitled to commissions in addition to the property devised.

The foregoing are illustrative of the cases relied upon, and, apart from some general language, which we are unable to accept as applicable to the present case, none of them, in principle, is in conflict with the conclusion we have reached. The distinction to be drawn is between compensation fixed by will for services to be rendered by the executor and a legacy to one upon the implied condition that he shall clothe himself with the character of executor. In the former case he must perform the service to earn the compensation. In the latter case he need do no more than in good faith comply with the condition in order to receive the bequest; and in that view the further provision that the bequest shall be in lieu of commissions is, in effect, nothing more than an expression of the testator's will that the executor shall not receive statutory allowances for the services he may render.

The word "bequest" having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress. *Kepner* v. *United States,* 195 U. S. 100, 124; *The Abbotsford,* 98 U. S. 440, 444.

On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most

important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould* v. *Gould,* 245 U. S. 151, 153. The rule is stated by Lord Cairns in *Partington* v. *Attorney-General,* L. R. 4 H. L. 100, 122:

"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." And see *Eidman* v. *Martinez,* 184 U. S. 578, 583.

We are of opinion that these bequests are not taxable as income under the statute, and the judgment below is

Affirmed.

KLEBE ET AL., COPARTNERS, TRADING AS L. KLEBE & COMPANY, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 78. Argued October 16, 17, 1923.—Decided November 12, 1923.

1. A contract implied in fact is one inferred from circumstances or acts of the parties; an express contract speaks for itself and excludes implications. P. 191.
2. Where the Government, relying on a purchase-privilege clause of a construction contract, appropriated a steam shovel, used in the

work, which the contractor had leased from another, *held*, that the shovel-owner's cause of action against the United States was either in tort, which could not be maintained under the Tucker Act, or upon the express contract, for payment as therein provided; but that a contract to pay the value of the shovel could not be implied. *Id.*

57 Ct. Clms. 160, affirmed.

APPEAL from a judgment of the Court of Claims, awarding the appellants damages under an express contract but refusing to recognize their larger claim of implied contract.

Mr. Daniel C. Donoghue for appellants.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* and *Mr. Charles H. Weston*, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellants, plaintiffs below, were the owners of a traction steam shovel, which they leased to the Bates & Rogers Construction Company for $25 per day. At the time of the lease and prior thereto the Construction Company was engaged, under contract, in certain work for the United States for which the shovel was procured and used. Article II, paragraph (c) of the contract under which the work was done provided that the Construction Company should be reimbursed for rentals actually paid for steam shovels, at rates which were named, the company being required to file with the contracting officer of the Government a schedule setting forth the fair valuation of each part of the construction plant at the time of its arrival at the site of the work. This valuation was made final except upon a contingency which is not material here. The paragraph further provided that when the total

rental paid by the Government for any such part should equal its valuation, no further rental should be paid and title thereto should vest in the United States. At the completion of the work the contracting officer was by the contract given the option to purchase for the United States any part of the plant then owned by the Construction Company by paying the difference between the valuation thereof and the total amount of rentals theretofore paid.

A written instrument leasing the steam shovel to the Construction Company was executed by the plaintiffs and the Construction Company, which, among other things, recited that plaintiffs had made themselves acquainted with the provisions of Article II of the contract between the Construction Company and the United States, which plaintiffs agreed should "apply to and be enforceable against the said equipment furnished and leased hereunder, to the end that the United States Government may have and exercise as to and against the said equipment all rights provided for in said paragraph (c), with respect to plant or parts thereof owned and furnished by the party of the second part" (the Construction Company); the plaintiffs "to be entitled, as owner, to receive any purchase price payments which upon any appropriation of said equipment by the United States Government, under said Article II, may be coming from said Government." The valuation of the shovel stated in the lease was $5,000. Basing his action expressly upon the provisions of the lease incorporating paragraph (c), and after $4,225 in rentals had been paid upon the shovel, the contracting officer, properly authorized to do so, exercised the option of the Government and took over the steam shovel as its property. This was done a short time before the completion of the work. The plaintiffs were notified but insisted that the lease did not authorize this action. The record shows that the Government has been ready and willing at all times to pay the difference ($775)

between the valuation of the shovel and the amount of rentals paid.

Plaintiffs insisted that the United States was not privy to the leasing contract and brought suit to recover the value of the shovel, viz., $5,000, upon the theory that it had been taken by the Government for public use and that thereby an implied obligation arose on the part of the Government to pay just compensation therefor. The court below, one judge dissenting, found that the property was taken under the express contract, creating a liability for $775 only, and, therefore, no implication of a promise could be indulged. Judgment for plaintiffs for this amount was rendered.

In *United States* v. *North American Co.*, 253 U. S. 330, this Court said (p. 335): "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, *Schillinger* v. *United States,* 155 U. S. 163, 168; *Basso* v. *United States,* 239 U. S. 602, but upon the existence of an implied contract entered into by the United States. *Langford* v. *United States,* 101 U. S. 341; *Bigby* v. *United States,* 188 U. S. 400; *Tempel* v. *United States,* 248 U. S. 121, 129; *United States* v. *Great Falls Manufacturing Co.*, [112 U. S. 645,] *supra; United States* v. *Lynah,* [188 U. S. 445, 462, 465,] *supra.*" But the circumstances may be such as to clearly rebut the existence of an implied contract, *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, 57; *Horstmann Co.* v. *United States,* 257 U. S. 138, 146, as here, where possession of the property was taken under an asserted claim of right to do so by virtue of an express contract. It is said that the claim is not well-founded, but that is not material. In *Tempel* v. *United States,* 248 U. S. 121, 130, this Court said: "It is unnecessary to determine whether this claim of the Government is well-founded. The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the

court from assuming jurisdiction of the controversy. The law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy." The parties here stipulated and the Court of Claims found that the property "was appropriated by the Government as its property under the purchase privilege clause of the contract between the plaintiffs and the Bates & Rogers Construction Company." A contract implied in fact is one inferred from the circumstances or acts of the parties; but an express contract speaks for itself and leaves no place for implications. See *King* v. *Kilbride,* 58 Conn. 109, 117; *Brown* v. *Fales,* 139 Mass. 21, 28. To sustain the contention that the express contract is not binding or enforceable in favor of the Government and consequently that its claim here is not well founded would not help the plaintiffs, since then the resulting cause of action would be one sounding in tort and not within the purview of the Tucker Act. *Tempel* v. *United States, supra.* In this view of the matter it becomes unnecessary to consider whether the privilege of purchase was prematurely exercised.

The Court of Claims did not dismiss the petition but rendered judgment in accordance with the terms of the express contract. Whether this action was proper under the pleadings we do not stop to inquire since the Government has not appealed therefrom and its liability under the express contract is admitted. The judgment is

Affirmed.

ANDERSON, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, *v.* CORALL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 44. Argued October 4, 1923.—Decided November 12, 1923.

1. Mere lapse of time, without imprisonment or other restraint contemplated by law, does not constitute service of sentence. P. 196.
2. Under the Parole Act of June 25, 1910, c. 387, 36 Stat. 819, as amended January 23, 1913, c. 9, 37 Stat. 650, where a federal convict breaks his parole and is retaken under a warden's warrant, the Board of Parole may revoke his parole at any time before his sentence has been fully served and require him to complete his term of imprisonment without deduction for the time spent on parole. P. 197.
3. With reference to the power of the Board to act as above, time intervening between the issuance of the warden's warrant and its execution, during which the federal convict was incarcerated in a state penitentiary for a state offense, is not to be counted as time served under his federal sentence. P. 197.

279 Fed. 822, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed an order of the District Court in *habeas corpus* discharging the present respondent from imprisonment in the federal penitentiary at Leavenworth.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for petitioner.

Mr. Lee Bond, for respondent, submitted.

MR. JUSTICE BUTLER delivered the opinion of the Court.

On November 25, 1914, Corall was convicted of the crime of breaking into a postoffice and was sentenced to

be confined in the Leavenworth penitentiary for three years from that date. He served in prison until February 24, 1916, when he was allowed to go out on parole under the Act of June 25, 1910, c. 387, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650, portions of which are printed in the margin.[1] On June 28, 1916, the warden in accordance with § 4 issued a warrant for the retaking of Corall as a parole violator. Before he was retaken, and in October, 1916, he was convicted at Chicago of another crime and sentenced therefor to the Illinois state penitentiary at Joilet, where he was confined until some time in December, 1919. After his release from that prison he was retaken, December 17,

[1] Section 1 is to the effect that prisoners may be released on parole as provided in the act.

Section 2 provides that the superintendent of prisons of the Department of Justice and the warden and physician of each United States penitentiary shall constitute a board of parole for such prison which shall establish rules and regulations for its procedure subject to the approval of the Attorney General.

Section 3. "That if it shall appear to said board of parole . . . that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then said board of parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by act of Congress; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. . . ."

Section 4. "That if the warden of the prison or penitentiary from which said prisoner was paroled or said board of parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or

1919, on the warden's warrant to the Leavenworth penitentiary. In January, 1920, the parole board, pursuant to § 6, took action appropriate to revoke and terminate the parole. The validity of that action is the only question involved.

Corall claims that, allowing deductions for good conduct (Act of June 21, 1902, c. 1140, 32 Stat. 397), the term of his sentence actually ended before the expiration of three years from the date it began and on or about March 17, 1917. The warden contends that the time elapsing between February 24, 1916, when he was paroled, and December 17, 1919, when he was retaken, can not be taken into account; that when the board acted to revoke his

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terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner."

Section 5. "That any officer of said prison or any federal officer authorized to serve criminal process within the United States, to whom such warrant shall be delivered, is authorized and required to execute such warrant by taking such prisoner and returning him to said prison within the time specified in said warrant therefor. . . ."

Section 6. "That at the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

Section 7 provides for a parole officer for each penitentiary, and makes it the duty of such officer to aid paroled prisoners in securing employment and to visit and exercise supervision over them while on parole and provides that the supervision of paroled prisoners may also be devolved upon the United States marshals when the board of parole may deem it necessary.

parole, the sentence had not been served, and he was bound to serve that part of it which remained unexpired when parole was granted. February 4, 1921, Corall made application for a writ of *habeas corpus* to the District Court for the District of Kansas. That court decided he was illegally held and ordered his discharge. The warden appealed to the Circuit Court of Appeals where the judgment was affirmed.

Mere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence. Escape from prison interrupts service, and the time elapsing between escape and retaking will not be taken into account or allowed as a part of the term. *Dolan's Case,* 101 Mass. 219, 222; *Petition of Moebus,* 73 N. H. 350, 352. The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is in legal effect imprisonment. The sentence and service are subject to the provision of § 6 that if the parole be terminated the prisoner shall serve the remainder of the sentence originally imposed without deduction for the time he was out on parole.

Corall's violation of the parole, evidenced by the warden's warrant and his conviction, sentence to and confinement in the Joliet penitentiary, interrupted his service under the sentence here in question, and was in legal effect on the same plane as an escape from the custody and control of the warden. His status and rights were analogous to those of an escaped convict. *Drinkall* v. *Spiegel, Sheriff,* 68 Conn. 441, 449, 450. The term of his sentence had not expired in October, 1916, when, at Chicago, he was convicted of another crime and sentenced to the Joliet penitentiary. Then—if not earlier—he ceased to be in

the legal custody and under the control of the warden of the Leavenworth penitentiary, as required by § 3 of the act and the terms of the parole authorized thereby. His claim that his term expired in 1917 before he was retaken and while he was serving sentence at Joliet cannot be sustained, and we hold that it had not expired in January, 1920, at the time of the action of the board. Under § 6, the board was authorized at any time during his term of sentence in its discretion to revoke the order and terminate the parole, and to require him to serve the remainder of the sentence originally imposed without any allowance for the time he was out on parole.

The judgment of the Circuit Court of Appeals is reversed, and the case is remanded to the District Court with directions that the respondent, Arthur Corall, be restored to the custody of the warden of the United States penitentiary at Leavenworth, Kansas.

TERRACE ET AL. *v.* THOMPSON, ATTORNEY GENERAL OF THE STATE OF WASHINGTON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 29. Argued April 23, 24, 1923.—Decided November 12, 1923.

1. A Washington statute (c. 50, Laws 1921,) disqualifies aliens who have not in good faith declared intention to become citizens of the United States from taking or holding interests in land in the State for farming or other purposes not excepted, and provides that upon the making of such prohibited conveyance the land shall be forfeited to the State and the grantors be subject to criminal punishment, and the alien also, if he fail to disclose the nature and extent of his interest. Citizens owning land in Washington and an alien Japanese, desirous of consummating a lease to the alien for farming, sued to enjoin the state attorney general from taking criminal and forfeiture proceedings, as he threatened

if the lease were made, alleging that the restriction violated the federal and state constitutions and conflicted with a treaty with Japan. *Held,* that the suit was within the equity jurisdiction of the District Court. P. 214.

2. State legislation withholding the right to own land in the State from aliens who have not in good faith declared their intention to become citizens of the United States, does not transgress the due process or equal protection clauses of the Fourteenth Amendment as applied to those aliens who, under the naturalization laws of Congress, are ineligible to citizenship, or as applied to citizens who desire to lease their land to such aliens. P. 216. *Truax* v. *Raich,* 239 U. S. 33, distinguished.

3. The treaty between the United States and Japan of February 21, 1911, 37 Stat. 1504, in granting liberty to the citizens and subjects of each party "to enter, travel and reside in the territories of the other, to carry on trade, . . . to own or lease and occupy houses, manufactories, warehouses and shops, . . . to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects," does not include the right to own, lease, or have any title to or interest in land for agricultural purposes, and the Washington statute above cited is not in conflict with it. P. 222.

4. As determined by the Supreme Court of the State, the Washington statute above cited is not in conflict with § 33, Art. II, of the state constitution. P. 224.

274 Fed. 841, affirmed.

APPEAL from a decree of the District Court dismissing a bill brought by the appellants to enjoin the attorney general of Washington from enforcing the state Alien Land Law.

Mr. James B. Howe, with whom *Mr. E. H. Guie* and *Mr. Dallas V. Halverstadt* were on the briefs, for appellants.

I. The case is within the equity jurisdiction. *Ex parte Young,* 209 U. S. 123; *Raich* v. *Truax,* 219 Fed. 273; *Truax* v. *Raich,* 239 U. S. 33; *Buchanan* v. *Warley,* 245 U. S. 60.

II. The state constitutional provision defines all disabilities of aliens respecting lands, and the legislature had no power to add thereto.

III. The act takes the property of the parties without due process of law, in that it prohibits the alien from following a common occupation of the community, and makes it a criminal offense for the landowners to avail themselves of his services in any capacity other than of a mere wage earner, and prohibits them from making a lawful use of their property. *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746; *Barbier* v. *Connolly* 113 U. S. 27; *Powell* v. *Pennsylvania,* 127 U. S. 678; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Coppage* v. *Kansas,* 236 U. S. 1; *Truax* v. *Raich,* 239 U. S. 33; *Adams* v. *Tanner,* 244 U. S. 590.

If a citizen desires to employ an alien as superintendent of his agricultural operations, and the alien is willing to perform these duties, such a contract cannot be prohibited by the legislature. The compensation to be paid for such services is a matter of contract between the parties; it might be fixed at a percentage of the receipts resulting from such operation. It is equally clear that a citizen landowner, absenting himself from the scene of his agricultural operations, may lawfully contract with an alien to carry on the operations in the name of the landowner and for his use, and to account for the money received; and that the compensation of the alien may be a stipulated sum or a percentage of the receipts, as the parties agree. Now, suppose the landowner to enter into a contract by which the alien agrees to farm the land and pay the landowner a stipulated sum as his share of the profits. Can it be said that the alien is any the less engaged in working as a farm hand than he would be in any of the preceding illustrations? If it be suggested that in the last case an estate in land is created, the obvious answer is that the Supreme Court of the State, in *Tibbals* v.

Iffland, 10 Wash. 451, has held that a lease does not create an estate in land. The further obvious answer is that to create a legal distinction between the two acts is to relegate substance to form, contrary to all of the decisions of this Court on constitutional questions. See *Tieton Hotel Co.* v. *Manheim,* 75 Wash. 641; *O'Brien* v. *Webb,* 279 Fed. 117.

The prohibition of the act is contrary to the due process clause of the Fourteenth Amendment, because it is, is effect, a prohibition of the right of an alien to engage in one of the common occupations of life. The applicability of the due process clause to the right of the citizen landowner is no less clear. The Terraces acquired this property prior to the passage of the act, at a time when it might lawfully be leased to a Japanese, but the act now prohibits this by severe penalties. Their right to use their property in a lawful way, and enjoy its fruits, has been proscribed.

Each of the parties may urge the invalidity of the act from the viewpoint of the other. *New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Truax* v. *Raich,* 239 U. S. 33; *Buchanan* v. *Warley,* 245 U. S. 60.

IV. The act violates the equal protection clause of the Fourteenth Amendment, in that it makes a classification which bears no reasonable relation to a legitimate legislative end. *Buchanan* v. *Warley,* 245 U. S. 60.

The act divides aliens into two classes, namely, those who may, and those who may not, become citizens of the United States, extending to the former all rights of citizens with respect to real estate, upon the filing of a declaration of intention, while barring the latter class absolutely, because none of them can at any time in good faith file a declaration of intention. Excepting rights of the State (1) to prohibit the ownership of lands within its border, there being no treaty to the contrary, *Chirac* v. *Chirac,* 2 Wheat.

259; *Hauenstein* v. *Lynham,* 100 U. S. 483; *DeVaughn* v. *Hutchinson,* 165 U. S. 565; *Clarke* v. *Clarke,* 178 U. S. 186; *Blythe* v. *Hinckley,* 180 U. S. 333; (2) to limit the right to take the common property of the State, such as game and fish, to citizens of the State, *McCready* v. *Virginia,* 94 U. S. 391; *Patsone* v. *Pennsylvania,* 232 U. S. 138; (3) to employ none but citizens on public work, *Atkin* v. *Kansas,* 191 U. S. 207; *Heim* v. *McCall,* 239 U. S. 175; and (4) to limit the right of the franchise to citizens of the State, *Yick Wo* v. *Hopkins,* 118 U. S. 356; aliens are within the equal protection clause as fully as citizens. *Ex parte Virginia,* 100 U. S. 339; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Wong Wing* v. *United States,* 163 U. S. 228; *United States* v. *Wong Kim Ark,* 169 U. S. 649; *American Sugar Refg. Co.* v. *Louisiana,* 179 U. S. 89; *Truax* v. *Raich,* 239 U. S. 33; *Buchanan* v. *Warley,* 245 U. S. 60; *Re Tiburcio Parrott,* 1 Fed. 481; *Ho Ah Kow* v. *Nunan,* 5 Sawy. 552; *Re Ah Fong,* 3 Sawy. 144; *State* v. *Montgomery,* 94 Me. 192; *Templar* v. *Board,* 131 Mich. 254; *Opinion of Justices,* 207 Mass. 601; *Commonwealth* v. *Titcomb,* 229 Mass. 14.

The legislature being powerless to discriminate against aliens in favor of citizens and to classify upon the ground of alienage, how can it in reason be said that it may nevertheless discriminate against some aliens in favor of others, or classify aliens among themselves?

It is, of course, true that Congress may permit all aliens, or any class of aliens, less than all, to be naturalized, for whatever reason may seem to it sufficient or wise, being bound by no constitutional limitation on the subject. *United States* v. *Wong Kim Ark,* 169 U. S. 649. But it must be remembered that, in the matter of admitting aliens to naturalization, Congress was dealing with a political subject, and not a property right. The act in question deals not with political rights, but with property

rights, because, at common law, and in the State of Washington, prior to the enactment in question, aliens had the absolute right to lease real estate for a reasonable term, that is, a term sufficiently short to have no incident whatever of ownership, direct or indirect. 1 R. C. L. p. 823, § 33; *Winston* v. *Morrison,* 18 Wash. 664. In view of this, it is apparent that the act of Congress cannot be used as the basis of the classification attempted in the act of the State.

Game and fish are the property of the State, within the plenary power of the legislature, and their taking may be prohibited to all persons who are not citizens of the State, yet, in *Re Ah Chong,* 6 Sawy. 45, a statute of California prohibiting all aliens incapable of becoming electors of the State from fishing in the waters of the State, was held violative of the equal protection clause and the treaty with China. This case was cited with approval in *San Mateo* v. *Southern Pacific Ry. Co.,* 15 Fed. 722; *United States* v. *Balsara,* 180 Fed. 694; *Re Takai Maru,* 190 Fed. 45; *Raich* v. *Truax,* 219 Fed. 273; *Tragesser* v. *Gray,* 73 Md. 251; *Commonwealth* v. *Cosick,* 36 Pa. Co. Ct. Rep. 637; *Harper* v. *Galloway,* 58 Fla. 255. *Contra: Commonwealth* v. *Hanna,* 195 Mass. 262. See also *State* v. *Savage,* 96 Ore. 53; *Poon* v. *Miller,* 234 S. W. 573; *Estate of Yano,* 188 Cal. 645.

If every foot of land within the State of Washington should pass into the ownership or possession of aliens, as imagined by the court below, then little could be said in defense of the act as an expression of representative government. But the assumptions which are permissible to the legislature, when enacting a rule of conduct, do not include such a theoretical possibility. Again, the act of government forcing on a resident within its jurisdiction a condition which causes him to lack an interest in and power effectually to work for the welfare of the State, and then classifying him on the ground of the necessary

result of that condition, does not square with the doctrine of American fair play. The statement of the lower court that a difference, however arbitrary, might be availed of as a ground of classification by a State, bound by the equal protection clause of the Fourteenth Amendment, is directly contrary to the decisions of this Court.

The only legitimate end to be accomplished by the act in question is insuring that the rights in or to real estate, mentioned in the act, shall be exercised only by those persons who adhere and are attached to, and respect, our government and its institutions. Aliens of the proscribed class, resident in the State, may fulfill this requirement as completely as the most patriotic citizen in the State, but they are nevertheless proscribed by the act. No means are afforded by which the ultimate fact, which is the legitimate end of such legislation, can be determined, and the question is forever foreclosed by the statute, irrespective of the fact. See *Smith* v. *Texas,* 233 U. S. 630.

It cannot be said that the subjects of Russia and Turkey are attached to or respect the American Government or its institutions; or that the admission to citizenship of the Zulu, the Kaffir, the cannibals of the Congo and the tribes of Ashantee and Dahomey, contribute to the success and preservation of our government and civilization. China has been a republic for some years and has been recognized as such by our government, but the Chinese cannot be admitted to citizenship, and hence are denied the right of other aliens to lands in the State of Washington. Japan stands among the foremost nations today, not only in civilization, accomplishment, civic pride, but in all those national attributes which make her one of the great recognized powers. Her nationals, resident in America, are notably law-abiding and industrious, and actuated by civic pride which well might be emulated by American citizens. Many of them have been residents of the State for years, have made it their permanent homes.

When an act, which concededly must have a substantial relation to the determination of the existence or absence of adherence and attachment to and respect for American institutions and the American Government, so utterly fails to accomplish that purpose, how can it be said that it is other than an arbitrary fiat formulated in utter disregard of the facts?

The vice of this act is that it makes a class within a class. *State* v. *Julow,* 129 Mo. 163; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Gulf, Colorado & S. F. Ry. Co.* v. *Ellis;* 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79; *McFarland* v. *American Sugar Refg. Co.,* 241 U. S. 79. A valid classification must have a reasonable relation to a legitimate end of government, and a classification which has no tendency to the accomplishment of that purpose is void.

White men, black men, red men, and brown men are very different, and there is a vast difference between a man of wealth and a poverty-stricken man, but a rule of conduct based upon such differences would be clearly invalid. *Gulf, Colorado & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150; *Tanner* v. *Little,* 240 U. S. 369; *Constantini* v. *Darwin,* 102 Wash. 402.

V. The impossibility of compliance with the act by a Japanese frees him from the obligation to comply. Endlich, Interpretation of Statutes, § 441; Bishop, Non-contract Law, § 156; Bishop, Contracts, § 595.

VI. The act is contrary to Art. I of the existing treaty between the United States and Japan, in that it prohibits Japanese subjects, resident in the State, from carrying on therein trade, from leasing land for commercial purposes and from doing the things necessary or incident to trade upon the same terms as native citizens or subjects. The treaty should be interpreted frankly and liberally to avoid invidious distinctions.

This alien being engaged in wholesale and retail trade in farm products, producing the farm products is a com-

mercial purpose and is incident to or necessary for trade therein. As to the meaning of the term "trade", see *Schooner Nymph,* 1 Sumn. 517; *May* v. *Sloan,* 101 U. S. 231; *Colby* v. *Dean,* 70 N. H. 591; *Jackson* v. *Town of Union,* 82 Conn. 266; *State v. North,* 160 N. C. 1010; *Smith* v. *Cooley,* 65 Cal. 46; *Finnegan* v. *Knights of Labor Bldg. Assn.,* 52 Minn. 239. These authorities show that the term "trade" is not always given a narrow meaning, but that its meaning is determined according to the apparent intention of the parties to the instrument in which it is used.

Mr. L. L. Thompson, Attorney General of the State of Washington, with whom *Mr. E. W. Anderson* was on the brief, for appellee.

I. It is submitted that there is no jurisdiction in equity; under *Boise Water Co.* v. *Boise City,* 213 U. S. 276; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481; *Dalton Adding Machine Co.* v. *Virginia,* 236 U. S. 699; *Cavanaugh* v. *Looney,* 248 U. S. 453. Neither can the jurisdiction be sustained on account of the severity of the penalty, under *Ex parte Young,* 209 U. S. 123. See *Tanner* v. *Little,* 240 U. S. 369.

II. Power to prohibit leases of this character was not denied by the state constitution. This Court is bound to accept the construction of that constitution adopted by the highest court of that State.

III. The argument that the transaction in question cannot be prohibited, under the Fourteenth Amendment assumes that the case is to be determined entirely by the general rules which obtain in ordinary police power cases. Even though that assumption be accepted the legislative action under consideration is sustainable.

The argument fails to distinguish between the particular thing here involved and the average occupation in which an alien might desire to engage; and is based

upon too broad a conception of the scope of the due process clause with reference to aliens, as applied in *Truax* v. *Raich*, 239 U. S. 33.

The validity of the particular restriction now before the Court, if the act be considered as an ordinary police measure, depends upon its relation to the public welfare, and is not determined by any announced conclusions of this Court with respect to the rights of aliens to follow other and different occupations. Concretely, the question is whether the Court can say that the public welfare could not be injuriously affected by the leasing of real property to persons who owe to the State and Nation no obligations of allegiance.

While the common law cannot justify the denial of a constitutional right, the fact that both the common law and the statute are in accord affords a cognate reason why the statute should be sustained. The public policy of prohibiting the alien ownership of real property, except in very limited cases, has been an outstanding principle of the common law almost since its inception. Coke Upon Littleton, Bk. 1–2b; 1 Black. Com. 372; 2 Kent. Com., 14th ed., 53–64; Kerr, Real Property, 215 et seq.; Tiffany, Real Property, 2350; 1 Stimson's Am. St. Law, 6013; 1 Stephens, Com. on Law of England, 330–376; Sedgewick, Trial of Title, 226; 1 Washburn, Real Property, 131; *Halter* v. *Nebraska*, 205 U. S. 34; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Jacobson* v. *Massachusetts*, 197 U. S. 11. The application of this rule to the question of the desirability of allowing aliens to possess dominion over the soil, will show that the preponderant public opinion of the country has always been opposed to this, and that this opinion has been particularly intensified in recent years. [Citing Wheaton, Int. Law, 5th ed., p. 138, note, and numerous

state statutes.] Congress has always limited the right to appropriate the unoccupied public domain to citizens or to persons who have filed declarations of intention to become such. Rev. Stats., § 2289. See also the acts respecting ownership of land in the Territories, and especially in Hawaii. 29 Stat. 618; 31 Stat. 154. It appears that aliens are not permitted to own real property in Japan. DeBecker's Annotated Civil Code of Japan, vol. 1, pp. 7, 238, 242.

This course of legislation indicates a uniform popular view that the public welfare is directly affected by the alien ownership of realty. It is particularly noteworthy that the most drastic action in this regard has been taken by those States in which there are found large bodies of aliens who are not permitted by Congress to become naturalized. Presumably, this legislation is the result of experience and of a more intimate knowledge of local conditions than the Court can obtain by the exercise of its judicial knowledge. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 160.

This Court has consistently recognized the power of the States with respect to the ownership of land by aliens. *Fairfax's Devisee* v. *Hunter's Lessee,* 7 Cr. 603; *Chirac* v. *Chirac,* 2 Wheat. 259; *Orr* v. *Hodgson,* 4 Wheat. 453; *Hauenstein* v. *Lynham,* 100 U. S. 483; *Atlantic & Pacific R. R. Co.* v. *Mingus,* 165 U. S. 413; *Taylor* v. *Benham,* 5 How. 233; *United States* v. *Repentigny,* 5 Wall. 211; *Blythe* v. *Hinckley,* 180 U. S. 333; *Truax* v. *Raich,* 239 U. S. 33; *Geofroy* v. *Riggs,* 133 U. S. 258; *Donaldson* v. *State,* 182 Ind. 615; 22 R. C. L. 83; 2 C. J. 1048; *Jones* v. *Jones,* 234 U. S. 615. The common law rule was in accord with the law of nations as recognized by all civilized countries. Wheaton, Int. Law, 5th ed., 132; Foelix, Droit International Privé, § 9; Vattel, Law of Nations (Chitty's ed.) p. 177; Coke Upon Littleton, Bk. 1–2b; 1 Black. Com. (Cooley's ed.) p. 669. If the power to pro-

hibit the holding of the fee simple title by an alien rests in the police power, then the same rule would, of course, apply to leases. The prosperity of the State must rest in large measure upon obligations incident to citizenship and national allegiance. The possession of the soil by persons who recognize no such obligations but who are bound only by specific statutory mandates thus has a direct relation to the public welfare. The importance of this is more marked in a nation whose governmental power is restricted by constitutional limitations than in an autocratic community. The fact that there is no relation between the employment of aliens in ordinary transitory occupations and the public welfare by no means compels the same conclusion where there is involved sovereignty over the soil, a thing upon which our political existence may well depend. The contention that because the situations have a surface similarity and that therefore the Fourteenth Amendment operates in the same degree in both instances, is simply another one of the oft-repeated attempts to define and limit the police power by specific definition and limitation. This Court has always consistently refused to do this. *Munn* v. *Illinois*, 94 U. S. 113. The police power is not restricted to emergency regulations, such as health measures, but extends to measures designed to subserve the public welfare and prosperity. *Barbier* v. *Connolly*, 113 U. S. 27; *Chicago, Burlington & Quincy Ry. Co.* v. *Illinois*, 200 U. S. 561; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157. The ownership of large parcels of realty by aliens may be dangerous to the public welfare of a State for many possible reasons. Unless the Court can see that the reasons for the law are illusory, the legislative action must be sustained.

It will probably be said in response to this that some of these reasons, such as the economic competition of foreign labor, might have been urged in support of the act

declared invalid in *Truax* v. *Raich*, 239 U. S. 33. We think that possibility would not dispose of the question. Once within our borders, an alien cannot be deprived of the right to live, and to live must labor or be supported by the charity of others. An interference with that right under the police power is, therefore, subject to certain limitations, the exact nature of which need not be specifically designated. The Arizona statute applied to all occupations, irrespective of their nature. The practical effect, as pointed out in the opinion, was to exclude aliens from the State,—a subject entrusted to Congress.

In the field of agriculture the American and Oriental cannot compete. The possible result of such a condition would be that in the course of time, in certain sections of the country, at least, all lands might pass to these classes of aliens. The people of the State would then be entirely dependent for their very existence upon alien races who recognize to the State or Nation no other obligations than those forcibly imposed.

Whether, under the laws of Washington, a lease creates an interest in real estate, is not material. It can make no differen e whether a lease be viewed as an interest in realty or as personal property. But leases have always been regarded in Washington as conveying an interest in land.

This, however, is not an ordinary police power case. The power exercised is broader than exists over the right of a citizen to follow the ordinary pursuits of life; it need not be justified by concrete instances of apprehended dangers, but should simply be recognized as one of the necessary incidents of governmental existence. Every writer on the law of nations and all civilized countries have recognized its existence since the beginning of history. It is a part of the sovereignty of a State, and of a kind, we submit, never intended to be taken away by the Fourteenth Amendment.

IV. Equal protection of the laws. The mere statement of the cause for the exercise of the power in this instance would seem to prevent any question of classification from arising, because the statute includes the entire field which occasioned the exercise of the power. The justification for the act under the police power does not rest upon the racial characteristics, or upon the idea that the excluded classes may not be law abiding and industrious. The regulation is occasioned by the legislative view that persons who are not at least morally bound by obligations of citizenship should not be permitted to obtain control of a thing so vital to the political existence of a State as is the land. The question of whether certain persons should be permitted to assume those obligations is entirely legislative, and consequently immaterial here. It is sufficient that Congress has refused to extend those privileges to certain races. It can make no difference whether their refusal to recognize those obligations is occasioned by deficiencies in their character or by an act of Congress. The result is the same in either case in so far as the public welfare of the State is concerned; that is to say, a thing upon which the State depends for its existence passes into the hands of persons who recognize no voluntary obligations to it.

The police power of the State extends to all subjects which affect the public welfare and the alleged fact that, if the National Government had acted differently, the occasion for the exercise of the power would not have arisen, is of no relevancy. This factor marks the distinction between the case of *Truax* v. *Raich, supra; Yick Wo* v. *Hopkins,* 118 U. S. 356, and various decisions of state and lower federal courts holding invalid, attempts to deprive aliens of the right to engage in various occupations and the case at bar.

Declarants in good faith are included in the same class as citizens, because they have taken the preliminary steps

looking to citizenship and presumably will, in due course, attain that citizenship. The fact that, to a greater or less extent, the same danger may be common to two classes of persons would not for that reason render a regulation directed at one class only, void. *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *Miller* v. *Wilson,* 236 U. S. 373; *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224; *International Harvester Co.* v. *Missouri,* 234 U. S. 199. There is an obvious difference between the service to the State to be expected from a person who has been permitted in a formal way to declare his intention to abandon his allegiance to another nation, and one who has not taken that step.

V. The act is not in conflict with the treaty.

Mr. Justice Butler delivered the opinion of the Court.

Appellants brought this suit to enjoin the Attorney General of Washington from enforcing the Anti-Alien Land Law of that State, c. 50, Laws, 1921, on the grounds that it is in conflict with the due process and equal protection clauses of the Fourteenth Amendment; with the treaty between the United States and Japan, and with certain provisions of the constitution of the State.

The appellants are residents of Washington. The Terraces are citizens of the United States and of Washington. Nakatsuka was born in Japan of Japanese parents and is a subject of the Emperor of Japan. The Terraces are the owners of a tract of land in King County which is particularly adapted to raising vegetables, and which for a number of years had been devoted to that and other agricultural purposes. The complaint alleges that Nakatsuka is a capable farmer and will be a desirable tenant of the land; that the Terraces desire to lease their land to him for the period of five years; that he desires to accept such lease, and that the lease would be made but

for the act complained of. And it is alleged that the defendant, as Attorney General, has threatened to and will take steps to enforce the act against the appellants if they enter into such lease, and will treat the leasehold interest as forfeited to the State, and will prosecute the appellants criminally for violation of the act; that the act is so drastic and the penalties attached to its violation are so great that neither of the appellants may make the lease even to test the constitutionality of the act, and that, unless the court shall determine its validity in this suit, the appellants will be compelled to submit to it, whether valid or invalid, and thereby will be deprived of their property without due process of law and denied the equal protection of the laws.

The Attorney General made a motion to dismiss the amended complaint upon the ground that it did not state any matters of equity or facts sufficient to entitle the appellants to relief. The District Court granted the motion and entered a decree of dismissal on the merits. The case is here on appeal from that decree.

Section 33 [1] of Article II of the Constitution of Washington prohibits the ownership of land by aliens other than those who in good faith have declared intention to become citizens of the United States, except in certain

[1] Section 33. The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this State, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of land hereafter made to any alien directly or in trust for such alien shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire-clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.

instances not here involved. The act [2] provides in substance that any such alien shall not own, take, have or hold the legal or equitable title, or right to any benefit of any land as defined in the act, and that land conveyed to or for the use of aliens in violation of the state constitution or of the act shall thereby be forfeited to the State. And it is made a gross misdemeanor, punishable by fine or imprisonment or both, knowingly to transfer land or the right to the control, possession or use of land to such an alien. It is also made a gross misdemeanor for any such alien having title to such land or the control, possession or use thereof, to refuse to disclose to the Attorney General or the prosecuting attorney the nature and extent of his interest in the land. The Attorney General and the prosecuting attorneys of the several counties are charged with the enforcement of the act.

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[2] Section 1. In this act, unless the context otherwise requires,

(a) "Alien" does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

(b) "Land" does not include lands containing valuable deposits of minerals, metals, iron, coal or fire-clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof. . . .

(d) To "own" means to have the legal or equitable title to or the right to any benefit of;

(e) "Title" includes every kind of legal or equitable title;

Section 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state.

1. The Attorney General questions the jurisdiction of the court to grant equitable relief even if the statute be unconstitutional. He contends that the appellants have a plain, adequate and speedy remedy at law; that the case involves but a single transaction, and that, if the proposed lease is made, the only remedy which the State has, so far as civil proceedings are concerned, is an escheat proceeding in which the validity of the law complained of may be finally determined; that an acquittal of the Terraces of the criminal offense created by the statute would protect them from further prosecution, and that Nakatsuka is liable criminally only upon his failure to disclose the fact that he holds an interest in the land.

The unconstitutionality of a state law is not of itself ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as that which equity could afford. *Boise Artesian Water Co.* v. *Boise City,* 213 U. S. 276, 281; *Walla Walla City* v. *Walla Walla Water Co.,* 172 U. S. 1, 11, 12. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity. *Cavanaugh* v. *Looney,* 248 U. S. 453, 456; *Truax* v. *Raich,* 239 U. S. 33, 37, 38. See also *Ex parte Young,* 209 U. S. 123, 155, 162; *Adams* v. *Tanner,* 244 U. S. 590, 592; *Greene* v. *Louisville & Interurban*

R. R. Co., id. 499, 506; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 293; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207, 217.

The Terraces' property rights in the land include the right to use, lease and dispose of it for lawful purposes (*Buchanan* v. *Warley*, 245 U. S. 60, 74), and the Constitution protects these essential attributes of property (*Holden* v. *Hardy*, 169 U. S. 366, 391), and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life. *Truax* v. *Raich*, *supra*; *Meyer* v. *Nebraska*, 262 U. S. 390. If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that after the making of the lease the validity of the law might be determined in proceedings to declare a forfeiture of the property to the State or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them

in violating the terms of the enactment and take the risk of forfeiture. Similarly Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevent each from dealing with the other. *Truax* v. *Raich, supra.* They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution.

2. Is the act repugnant to the due process clause or the equal protection clause of the Fourteenth Amendment?

Appellants contend that the act contravenes the due process clause in that it prohibits the owners from making lawful disposition or use of their land, and makes it a criminal offense for them to lease it to the alien, and prohibits him from following the occupation of farmer; and they contend that it is repugnant to the equal protection clause in that aliens are divided into two classes,—those who may and those who may not become citizens, one class being permitted, while the other is forbidden, to own land as defined.

Alien inhabitants of a State, as well as all other persons within its jurisdiction, may invoke the protection of these clauses. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369; *Truax v. Raich, supra,* 39. The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the State, protects the owners in their

right to lease and dispose of their land for lawful purposes and the alien resident in his right to earn a living by following ordinary occupations of the community, but it does not take away from the State those powers of police that were reserved at the time of the adoption of the Constitution. *Barbier* v. *Connolly,* 113 U. S. 27, 31; *Mugler* v. *Kansas,* 123 U. S. 623, 663; *Powell* v. *Pennsylvania,* 127 U. S. 678, 683; *In re Kemmler,* 136 U. S. 436, 449; *Lawton* v. *Steel,* 152 U. S. 133, 136; *Phillips* v. *Mobile,* 208 U. S. 472, 479; *Hendrick* v. *Maryland,* 235 U. S. 610, 622, 623. And in the exercise of such powers the State has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.

And, while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders. *Hauenstein* v. *Lynham,* 100 U. S. 483, 484, 488; *Blythe* v. *Hinckley,* 180 U. S. 333, 340. Mr. Justice Field, speaking for this Court (*Phillips* v. *Moore,* 100 U. S. 208) said (p. 212):

"By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government." [3]

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[3] In *Fairfax's Devisee* v. *Hunter's Lessee,* 7 Cranch, 603, 609, 619, 620, it was said, per Story, J.: "It is clear by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the act of the party. . . . In the language of the ancient law, the alien has the capacity to *take,* but not to *hold* lands, and they may be seized into the hands of the sovereign." See also 1 Cooley's Blackstone (4th ed.) 315, *372; 2 Kent's Commentaries (14th ed.) 80. *54.

State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause.

This brings us to a consideration of appellants' contention that the act contravenes the equal protection clause. That clause secures equal protection to all in the enjoyment of their rights under like circumstances. *In re Kemmler, supra; Giozza* v. *Tiernan,* 148 U. S. 657, 662. But this does not forbid every distinction in the law of a State between citizens and aliens resident therein. In *Truax* v. *Corrigan,* 257 U. S. 312, this Court said (p. 337):

"In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary. . . . Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

The rights, privileges and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. Formerly in many of the States the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. By various acts of Congress,[4]

[4]Act of March 3, 1863, c. 75, 12 Stat. 731; Act of April 22, 1898, c. 187, 30 Stat. 361; Act of January 21, 1903, c. 196, 32 Stat. 775; Act of June 3, 1916, c. 134, §§ 57, 111, 39 Stat. 197; Act of May 18, 1917, c. 15, § 2; Act of July 9, 1918, c. 143; Act of August 31, 1918, c. 166, 40 Stat. 76, 884, 955.

declarants have been made liable to military duty, but no act has imposed that duty on nondeclarants. The fourth paragraph of Article I of the treaty invoked by the appellants, provides that the citizens or subjects of each shall be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; also from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions. The alien's formally declared bona fide intention to renounce forever all allegiance and fidelity to the sovereignty to which he lately has been a subject, and to become a citizen of the United States and permanently to reside therein [5] markedly distinguishes him from an ineligible alien or an eligible alien who has not so declared.

By the statute in question all aliens who have not in good faith declared intention to become citizens of the United States, as specified in § 1 (a), are called "aliens," and it is provided that they shall not "own" "land," as defined in clauses (d) and (b) of § 1 respectively. The class so created includes all, but is not limited to, aliens not eligible to become citizens. Eligible aliens who have not declared their intention to become citizens are included, and the act provides that unless declarants be admitted to citizenship within seven years after the declaration is made, bad faith will be presumed. This leaves the class permitted so to own land made up of citizens and aliens who may, and who intend to, become citizens, and who in good faith have made the declaration required by the naturalization laws. The inclusion of good faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible or

[5] Act of June 29, 1906, c. 3592, 34 Stat. 596, as amended, Act of June 25, 1910, c. 401, 36 Stat. 829.

against eligible aliens who have failed to declare their intention. The classification is based on eligibility and purpose to naturalize. Eligible aliens are free white persons and persons of African nativity or descent.[6] Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the naturalization laws,—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below (274 Fed. 841, 849) that:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the

[6] Act of July 14, 1870, c. 254, § 7, 16 Stat. 256, as amended, Act of February 18, 1875, c. 80, 18 Stat. 318; *Ozawa* v. *United States*, 260 U. S. 178; *United States* v. *Thind*, 261 U. S. 204.

realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens."

And we think it is clearly within the power of the State to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may but who will not naturalize are obvious.

Truax v. *Raich, supra,* does not support the appellants' contention. In that case, the Court held to be repugnant to the Fourteenth Amendment an act of the legislature of Arizona making it a criminal offense for an employer of more than five workers at any one time, regardless of kind or class of work, or sex of workers, to employ less than eighty per cent. qualified electors or native born citizens of the United States. In the opinion it was pointed out that the legislation there in question did not relate to the devolution of real property, but that the discrimination was imposed upon the conduct of ordinary private enterprise covering the entire field of industry with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure.

In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself.

The Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease.

The state act is not repugnant to the equal protection clause and does not contravene the Fourteenth Amendment.

3. The state act, in our opinion, is not in conflict with the treaty [7] between the United States and Japan. The preamble declares it to be "a treaty of commerce and navigation", and indicates that it was entered into for the purpose of establishing the rules to govern commercial intercourse between the countries.

The only provision that relates to owning or leasing land is in the first paragraph of Article I, which is as follows:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

For the purpose of bringing Nakatsuka within the protection of the treaty, the amended complaint alleges that, in addition to being a capable farmer, he is engaged in the business of trading, wholesale and retail, in farm products and shipping the same in intrastate, interstate and foreign commerce; and, instead of purchasing such farm products, he has produced, and desires to continue to produce, his own farm products for the purpose of selling them in such wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing farm products for such trade he will be prevented from engaging in trade and the incidents to trade, as he is authorized to do under the treaty.

[7] 37 Stat. 1504–1509.

To prevail on this point, appellants must show conflict between the state act and the treaty. Each State, in the absence of any treaty provision conferring the right, may enact laws prohibiting aliens from owning land within its borders. Unless the right to own or lease land is given by the treaty, no question of conflict can arise. We think that the treaty not only contains no provision giving Japanese the right to own or lease land for agricultural purposes, but, when viewed in the light of the negotiations leading up to its consummation, the language shows that the high contracting parties respectively intended to withhold a treaty grant of that right to the citizens or subjects of either in the territories of the other. The right to "carry on trade" or "to own or lease and occupy houses, manufactories, warehouses and shops", or "to lease land for residential and commercial purposes", or "to do anything incident to or necessary for trade" cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes. A careful reading of the treaty suffices in our opinion to negative the claim asserted by appellants that it conflicts with the state act.

But if the language left the meaning of its provisions doubtful or obscure, the circumstances of the making of the treaty, as set forth in the opinion of the District Court (*supra,* 844, 845), would resolve all doubts against the appellants' contention. The letter of Secretary of State Bryan to Viscount Chinda, July 16, 1913, shows that, in accordance with the desire of Japan, the right to own land was not conferred. And it appears that the right to lease land for other than residential and commercial purposes was deliberately withheld by substituting the words of the treaty, "to lease land for residential and commercial purposes" for a more comprehensive clause

contained in an earlier draft of the instrument, namely, "to lease land for residential, commercial, industrial, manufacturing and other lawful purposes."

4. The act complained of is not repugnant to § 33 of Article II of the state constitution.

That section provides that "the ownership of lands by aliens . . . is prohibited in this State . . .". Appellants assert that the proposed lease of farm land for five years is not "ownership", and is not prohibited by that clause of the state constitution and cannot be forbidden by the state legislature. That position is untenable. In *State* v. *O'Connell,* 121 Wash. 542, a suit for the purpose of escheating to the State an undivided one-half interest in land, or the proceeds thereof, held in trust for the benefit of an alien, a subject of the British Empire, decided since this appeal was taken, the Supreme Court of Washington held that the statute in question did not contravene this provision of the constitution of that State. The question whether or not a state statute conflicts with the constitution of the State is settled by the decision of its highest court. *Carstairs* v. *Cochran,* 193 U. S. 10, 16. This Court "is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State". *Quong Ham Wah Co.* v. *Industrial Commission,* 255 U. S. 445, 448, and cases cited.

The decree of the District Court is affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

PORTERFIELD ET AL. *v.* WEBB, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 28. Argued April 23, 24, 1923.—Decided November 12, 1923.

1. The treaty of February 21, 1911, 37 Stat. 1504, between the United States and Japan, does not confer upon Japanese subjects the privilege of acquiring or leasing land for agricultural purposes. P. 232. *Terrace* v. *Thompson, ante,* 197.
2. The California Alien Land Law, by permitting aliens eligible to citizenship under the laws of the United States to acquire, possess, enjoy and transfer real property in the State, while permitting other aliens to exercise these rights only as prescribed by existing treaty between the United States and their respective countries, does not violate the equal protection clause of the Fourteenth Amendment, as applied to ineligible aliens who have not such rights by treaty, or to citizens desirous of letting their land to such aliens. P. 232. *Terrace* v. *Thompson, ante,* 197.

279 Fed. 114, affirmed.

APPEAL from an order of the District Court denying a motion for a temporary injunction, in a suit brought by appellants to enjoin appellees from enforcing the California Alien Land Law.

Mr. Louis Marshall for appellants.

I. We may freely concede that, in conformity with the common law, it was within the power of California to confine the ownership of land, or of an interest therein, to citizens. Far from asserting this power, it has in its Civil Code affirmatively recognized the right of all aliens to acquire real property, and by the Acts of 1913 and 1920 has recognized the right of one class of aliens without restriction of any kind to own any interest whatsoever in California lands, and has at the same time forbidden another class to acquire any interest at all in realty except as permitted by treaty. This, we earnestly contend,

denies to the latter that equal protection of the laws guaranteed by the Fourteenth Amendment "to any person within the jurisdiction of the State."

What § 1 of the Act of 1920 confers upon some aliens, is by § 2 denied to others, solely because in one case the aliens are white or black and in the other they are red, yellow or brown. It is not made dependent upon character, morals, economic position, intellectual or physical capacity, ability to increase the wealth of the State or the value of its taxable property, or a willingness to serve the State. It is merely the result of arbitrary selection, and as between aliens coming from fifty different lands those from forty are given the unqualified and unconditional right to acquire real property or an interest in it, while those coming from ten other countries are absolutely prohibited, under the penalty of escheat, imprisonment and fine, from taking even a lease for a single year of realty devoted to uses other than for residential or commercial purposes. Can this be said to constitute the equal protection of the laws? *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; *Ex parte Kotta,* 62 Cal. Dec. 315; *Ex parte Terui,* 187 Cal. 20; *Estate of Yano,* 188 Cal. 645.

Immediately after the adoption of the Fourteenth Amendment in various of the States, and especially in California, laws were enacted directed against the Chinese inhabitants of those States, the constitutionality of which was passed upon in the federal courts, and in which the Fourteenth Amendment became the rock of refuge. *Ho Ah Kow* v. *Nunan,* 5 Sawy. 552; *Re Tiburcio Parrott,* 1 Fed. 481; *Re Ah Chong,* 2 Fed. 733; *Opinion of Justices,* 207 Mass. 601.

See also: *Re Ah Fong,* 3 Sawy. 144; *Laundry Ordinance Case,* 13 Fed. 229; *Gandolfo* v. *Herman,* 49 Fed. 181; *Re Ty Loy,* 26 Fed. 611; *Re Sam Kee,* 31 Fed. 681; *Re Lee Sing,* 43 Fed. 359; *Ex parte Sing Lee,* 96 Cal. 354; *Ex*

parte Case, 20 Idaho, 128; *Poon* v. *Miller,* 234 S. W. 573. Distinguishing, *Heim* v. *McCall,* 239 U. S. 175; *Crane* v. *New York,* 239 U. S. 195.

Other alien cases to be noted are: *Fraser* v. *McConway & Torley Co.,* 82 Fed. 257; *Juniata Limestone Co.* v. *Fagley,* 187 Pa. St. 193; *State* v. *Montgomery,* 94 Me. 192; *Templar* v. *Board,* 131 Mich. 254; *Vietti* v. *Mackie Fuel Co.,* 109 Kans. 179.

Cases affecting negroes under the equality clause: *Slaughter-House Cases,* 16 Wall. 36; *Buchanan* v. *Warley,* 245 U. S. 60; *Ex parte Virginia,* 100 U. S. 339; *Neal* v. *Delaware,* 103 U. S. 370; *Gibson* v. *Mississippi,* 162 U. S. 565; *Williams* v. *Mississippi,* 170 U. S. 213; *Carter* v. *Texas,* 177 U. S. 442; *Rogers* v. *Alabama,* 192 U. S. 226; *Martin* v. *Texas,* 200 U. S. 316; *Kentucky* v. *Powers,* 201 U. S. 1, 32; *McCabe* v. *Atchison, Topeka & S. F. Ry. Co.,* 235 U. S. 151.

Other decisions under the equality clause: *Railroad Tax Cases,* 13 Fed. 722; *Santa Clara County* v. *Southern Pacific R. R. Co.,* 18 Fed. 385; 118 U. S. 394; *Gulf, Colorado & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150; *Atchison, Topeka & S. F. Ry. Co.* v. *Vosburg,* 238 U. S. 56; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20; *Smith* v. *Texas,* 233 U. S. 630; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Kansas City Southern Ry. Co.* v. *Road Improvement District,* 256 U. S. 658; *State* v. *Julow,* 129 Mo. 163.

II. The act is likewise unconstitutional because it deprives Porterfield, who is a citizen of the United States, of the right to enter into contracts for the leasing of his realty, and because it deprives Mizuno of his liberty and property by debarring him from entering into a contract for the purpose of earning a livelihood in a lawful occupation. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v.

Raich, 239 U. S. 33; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Smith* v. *Texas*, 233 U. S. 630; *Coppage* v. *Kansas*, 236 U. S. 1.

Mr. U. S. Webb, Attorney General of the State of California, with whom *Mr. Frank English*, Deputy Attorney General, *Mr. Thomas Lee Woolwine* and *Mr. Tracy C. Becker* were on the brief, for appellees.

I. The Alien Land Law of California does not violate the Fourteenth Amendment.

The State has the fundamental right to prohibit alien ownership, possession, dominion over or enjoyment of land. The Fourteenth Amendment was never intended to affect this right.

It is obvious that the due process of law required by the Fourteenth Amendment has no application to the subject matter here.

If there exists a reason for dividing people into two classes as (1) citizens, and (2) aliens, in respect of a particular subject matter of legislation, it is also competent to apply to those classes different legislative treatment. If there exists an equally good reason for again dividing either of these divisions into classes, it is equally competent to apply to those classes different legislative treatment.

The classification adopted in the California Alien Land Act is (1) aliens eligible to citizenship, and (2) aliens not eligible to citizenship. The first class owes allegiance to the State and to the Nation. Experience of more than a century has shown that large numbers from the first class do assume the burdens, duties and responsibilities of citizenship, severing their allegiance from the old and swearing allegiance to their new government. The second class, irrespective of their desires, can never become citizens of this government or free themselves from the

obligations and allegiance to their own government. They can never become the support and dependence of this nation but remain the support, maintenance and dependence of their own government. They are and must continue to be aliens unassimilated and unassimilable and in full harmony, sympathy and accord with their own government when the call to arms comes. They are, and must by reason of their allegiance remain, not only aliens within our borders, but enemies when the nations are in conflict. This is valid classification. *Perley* v. *North Carolina,* 249 U. S. 510; *Moody* v. *Hagen,* 36 N. D. 47; *Truax* v. *Corrigan,* 257 U. S. 312; *Terrace* v. *Thompson,* 274 Fed. 841, and cases there cited.

The modern application of the common law rule, dating back to the time of the Year Books, that the only title which an alien could acquire to real property was a title subject to defeasance by the sovereign, could not be better expressed than it is by the court in the *Terrace Case, supra.*

Secretary of State Bryan, in his diplomatic correspondence with the Japanese Ambassador, following the enactment of the earlier California Alien Land Law of 1913, expressed the necessity for the fundamental doctrine of a nation's control of its land tenure in convincing language. Papers Relating to the Foreign Relations of the United States, 1913, Department of State, p. 641.

The fundamental question is not one of race discrimination. It is a question of recognizing the obvious fact that the American farm, with its historical associations of cultivation and environment, including the home life of its occupants, cannot exist in competition with a farm developed by Orientals with their totally different standards and ideas of cultivation of the soil, of living and social conditions.

The conservative and intelligent statesmen of Japan have recognized this truth just as fully as have those of America.

Rights to land ownership and to citizenship in any country must depend on the judgment of the statesmen of that country. These are problems which throughout the years of international relationships between governments have been settled by each nation for itself.

That the State may prohibit alien ownership of land, see *Tanner* v. *Staeheli,* 112 Wash. 344. See also *Frick* v. *Webb,* 281 Fed. 407; *In re Akado,* 188 Cal. 739.

An alien may inherit land or take by law only by grace of the State within the boundaries of which the lands are situate. *In re Colbert's Estate,* 44 Mont. 259.

[Counsel then drew comparisons of the act with the Washington statute upheld in *Terrace* v. *Thompson, ante,* 197, and with alien land legislation in other States and countries.]

II. Sections 1977 and 2164, U. S. Rev. Stats., are not violated by the California Alien Land Law.

III. The California Law does not violate the treaty with Japan. This is evident from an examination of the treaty and the diplomatic negotiations preceding its approval.

An historical analysis of the several treaties between Japan and the United States also shows that leasehold interests have always been restricted to lands devoted solely to trade and commerce.

Foreigners have no right to own or lease lands for agricultural purposes under the law of Japan.

IV. The plaintiff alien is not "carrying on trade, wholesale and retail," or leasing land for "commercial purposes" within the scope of the treaty with Japan. Just as the manufacture of sugar and of intoxicating liquors to be thereafter transported in interstate commerce is not a part of such commerce within the provision of the commerce clause of the Constitution, so by the same reasoning the pursuit of a farmer in raising agricultural products is not the pursuit of commerce within the terms

of our treaty with Japan. *Terrace* v. *Thompson,* 274 Fed. 841; *Kidd* v. *Pearson,* 128 U. S. 1; *United States* v. *Knight Co.,* 156 U. S. 1; *Hopkins* v. *United States,* 171 U. S. 578; *Capital City Co.* v. *Ohio,* 183 U. S. 238.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellants brought this suit to enjoin the above named Attorney General and District Attorney from enforcing the California Alien Land Law, submitted by the initiative and approved by the electors, November 2, 1920. [Stats. 1921, p. lxxxiii.]

Appellants are residents of California. Porterfield is a citizen of the United States and of California. Mizuno was born in Japan of Japanese parents and is a subject of the Emperor of Japan. Porterfield is the owner of a farm in Los Angeles County containing 80 acres of land, which is particularly adapted to raising vegetables, and which for some years has been devoted to that and other agricultural purposes. The complaint alleges that Mizuno is a capable farmer and a desirable person to become a tenant of the land, and that Porterfield desires to lease the land to him for a term of five years, and that he desires to accept the lease, and that the lease would be made but for the act complained of. And it is alleged that the appellees, as Attorney General and District Attorney, have threatened to enforce the act against the appellants if they enter into such lease, and will forfeit, or attempt to forfeit, the leasehold interest to the State and will prosecute the appellants criminally for violation of the act. It is further alleged that the act is so drastic and the penalties attached to a violation of it are so great that neither of the appellants may make the lease even for the purpose of testing the constitutionality of the act, and that, unless the court shall determine its validity in this suit, appellants will be compelled to submit to it, whether valid or invalid, and thereby will be deprived of

their property without due process of law and denied equal protection of the laws.

Appellants made a motion for a temporary injunction to restrain appellees, during the pendency of the suit, from bringing or permitting to be brought any proceeding for the purpose of enforcing the act against the appellants. This was heard by three judges as provided in § 266 of the Judicial Code. The motion was denied.

The act provides in §§ 1 and 2 as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Other sections provide penalties by escheat and imprisonment for violation of § 2.

The treaty between the United States and Japan (37 Stat. 1504–1509) does not confer upon Japanese subjects the privilege of acquiring or leasing land for agricultural purposes. *Terrace* v. *Thompson, ante,* 197.

Appellants contend that the law denies to ineligible aliens equal protection of the laws secured by the Fourteenth Amendment, because it forbids them to lease land in the State although the right to do so is conferred upon all other aliens. They also contend that the act is unconstitutional because it deprives Porterfield of the right to enter into contracts for the leasing of his realty, and

deprives Mizuno of his liberty and property by debarring him from entering into a contract for the purpose of earning a livelihood in a lawful occupation.

This case is similar to *Terrace* v. *Thompson, supra.* In that case the grounds upon which the Washington Alien Land Law was attacked included those on which the California act is assailed in this case. There the prohibited class was made up of aliens who had not in good faith declared intention to become citizens. The class necessarily includes all ineligible aliens and in addition thereto all eligible aliens who have failed so to declare. In the case now before us the prohibited class includes ineligible aliens only. In the matter of classification, the States have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different States. We cannot say that the failure of the California Legislature to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens of the United States was arbitrary or unreasonable. See *Miller* v. *Wilson,* 236 U. S. 373, 383, 384, and cases cited.

Our decision in *Terrace* v. *Thompson, supra,* controls the decision of all questions raised here.

The order of the District Court is affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

McGREGOR *v.* HOGAN, SHERIFF OF WARREN COUNTY, GEORGIA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 58. Argued October 9, 1923.—Decided November 12, 1923.

1. A state taxing statute which, although not providing for notice and hearing before the assessment of property by a board of assessors, grants the taxpayer after due notice the right to a hearing before arbitrators, to be selected one by himself, one by the board, and a third by these two, who shall finally assess and fix the valuation of his property, affords him the notice and hearing required by due process of law; and a taxpayer who, being duly notified of the board's assessment, abstains from demanding an arbitration, so that under the statute the assessment becomes final, has no ground for attacking the assessment as unconstitutional. P. 236.
2. This case differs from *Turner* v. *Wade*, 254 U. S. 64, involving the same statute, where the arbitration failed because the arbitrators could not agree, yet the assessment, made by the board of assessors without notice or hearing, was nevertheless held conclusive by the state court under a provision of the statute making the board's assessment final when the arbitrators do not decide within a specified time. P. 237.

153 Ga. 473, affirmed.

ERROR to a judgment of the Supreme Court of Georgia, denying relief in a suit to enjoin enforcement of an execution for taxes.

Mr. L. D. McGregor, with whom *Mr. Virgil E. Adams* was on the briefs, for plaintiff in error.

Mr. E. P. Davis, with whom *Mr. Geo. M. Napier*, Attorney General of the State of Georgia, and *Mr. J. Cecil Davis* were on the brief, for defendants in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

McGregor, the plaintiff in error, filed a petition in a Superior Court of Georgia to enjoin the enforcement of

an execution for taxes assessed against his property, alleging that the Tax Equalization Act (Georgia Laws, 1913, p. 123) under which they had been assessed was in conflict with the due process clause of the Fourteenth Amendment. After a hearing on pleadings and proof judgment was entered denying the injunction. This was affirmed by the Supreme Court of the State. 153 Ga. 473.

McGregor's contention here, as it was in the state courts, is that by § 6 of the Tax Equalization Act the assessment of taxes made by the Board of County Tax Assessors *ex parte* "becomes final and conclusive against the taxpayer without any notice or an opportunity to be heard thereon," thereby depriving him of his property without due process of law.

This act was before this Court in *Turner* v. *Wade,* 254 U. S. 64. Section 6 [1] requires the Board of County Tax Assessors to examine the returns of the taxpayers of the county; and if, in its opinion, any taxpayer has failed to return any of his property at a just and fair valuation, the Board shall correct such return and assess such valuation. The Board shall immediately give notice to any taxpayer of any change made in his return; and if any taxpayer is dissatisfied with its action he may, within a specified time, give notice to the Board that he demands an arbitration; giving the name of his arbitrator. The Board shall then name its arbitrator and these two shall select a third, a majority of whom shall fix the assessment on the property; and their decision shall be final.[2] The arbitrators shall take an official oath "before entering upon a hearing"; and they shall render their decision

[1] The greater part of this section is set forth in the margin of the opinion in *Turner* v. *Wade, supra,* at p. 66.

[2] Except so far as the same may be affected by the findings and orders of the State Tax Commissioner, who is authorized by § 13 of the act to adjust and equalize the tax valuations of various classes of property as made in the several counties of the State.

within ten days from the naming of the arbitrator by the Board, else the decision of the Board shall stand affirmed and be binding in the premises.

McGregor returned his property for taxation at the value of $12,500. The Board, without notice or hearing, raised this valuation to $23,256. It duly notified McGregor of such increase. He did not, however, demand an arbitration—being advised by his counsel, it is stated, that in *Turner* v. *Wade, supra,* this Court had held the arbitration clause of the act to be unconstitutional. Thereafter, the time allowed by the act in which he might demand an arbitration having expired, execution was issued for the taxes at the valuation assessed by the Board.

The act, it is true, as recognized by the Supreme Court of Georgia in the present case, does not require the Board of Assessors to give any notice to the taxpayer or grant him a hearing before assessing the value of the property. *Turner* v. *Wade, supra,* p. 70. It does not, however, make this assessment by the Board final and conclusive against the taxpayer. On the contrary, it requires notice to him of any change made from the valuation at which he returned his property, and gives him the right to a hearing before arbitrators, who, acting under oath, shall finally determine and fix the valuation at which the property is to be assessed. That the taxpayer's right to an arbitration includes the right to a hearing before the arbitrators, is not only apparent from the specific reference to "a hearing," but is the construction given by the Supreme Court of the State in *Ogletree* v. *Woodward,* 150 Ga. 691, 696, and *Wade* v. *Turner,* 146 Ga. 600, and in the present case. This construction of the act by the highest court of the State is to be accepted by this Court. *Farncomb* v. *Denver,* 252 U. S. 7, 10. Furthermore, in *Turner* v. *Wade, supra,* p. 70, this Court reached independently the same conclusion and stated that in the event of dissatisfaction of the taxpayer "the arbitration was to afford a hearing to him."

It is not essential to due process of law that the taxpayer be given notice and hearing before the value of his property is originally assessed; it being sufficient if he is granted the right to be heard on the assessment before the valuation is finally determined. *Pittsburgh Railway* v. *Backus,* 154 U. S. 421, 426. And see *McMillen* v. *Anderson,* 95 U. S. 37, 42, and *Turpin* v. *Lemon,* 187 U. S. 51, 58. The requirement of due process is that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the amount of the tax by giving him the right to appear for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed. *Turner* v. *Wade, supra,* p. 67. And see *Londoner* v. *Denver,* 210 U. S. 373, 385.

And since this act, although not providing for notice and hearing before the assessment by the Board of Assessors, grants the taxpayer after due notice the right to a hearing before arbitrators who shall finally assess and fix the valuation of his property, we find in its provisions no want of that notice and hearing which is essential to due process. The decision of this Court in *Turner* v. *Wade, supra,* upon which McGregor relies, is not in conflict with this conclusion. There was not in that case any holding that § 6 of the act was unconstitutional on its face for want of necessary provisions for notice and hearing,—the right to notice of the assessment and hearing before the arbitrator being specifically recognized—but merely a holding, (p. 70), that, since the arbitration had failed because the arbitrators could not agree upon the valuation and no majority award had been made within the specified ten-day period, and the act had been construed and applied by the Supreme Court of the State as making the original assessment by the Board of Assessors final in such situation, the taxpayer had thus become subject to the assessment made by the Board of Assessors without notice and hearing, without the revisory action by the arbitrators

provided by the act, and had, on these facts, and under such construction and application of the act, been denied the due process of law.

In short, it was not held that either § 6 of the act or the arbitration provisions thereof were in and of themselves unconstitutional, but merely, in effect, that when the arbitration demanded by the taxpayer became inoperative through no default on his part, he could not in consequence be lawfully subjected to the previous assessment made without notice and hearing. Manifestly this decision has no application to the present case, where the provisions for arbitration did not thus become inoperative, but McGregor declined to avail himself of the arbitration to which the act entitled him, and the assessment that had been made by the Board of Assessors was thus rendered final and conclusive not by the force of the act itself but by his own deliberate default.

Having thus failed to avail himself of the hearing granted by the act he was properly held by the Supreme Court of Georgia to have no just ground of complaint. Where a city charter gives property owners an opportunity to be heard before a board of assessors with respect to the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot thereafter be heard to complain of such assessments as unconstitutional. *Farncomb* v. *Denver, supra,* p. 11; cited with approval in *Milheim* v. *Improvement District,* 262 U. S. 710, 724, in reference to an analogous situation.

The judgment of the Supreme Court of Georgia is accordingly

Affirmed.

DAVIS, DESIGNATED AGENT UNDER THE TRANSPORTATION ACT, *v.* WOLFE.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 71. Argued October 12, 1923.—Decided November 12, 1923.

1. Where a failure of a railway company to comply with the Safety Appliance Act is the proximate cause of an accident resulting in injury to an employee while in the discharge of his duty, he may recover, although the operation in which he was engaged was not of the kind in which the appliances required by the act were specifically designed to furnish him protection. P. 241.
2. So *held* where a conductor, engaged in signalling orders for the movement of a freight train while riding on the side of a car with his feet in a sill-step and one hand grasping a grab-iron, was thrown to the ground, as the train moved forward contrary to his order, and was run over, his fall being attributable to the loose condition of the grab-iron.

294 Mo. 170, affirmed.

CERTIORARI to a judgment of the Supreme Court of Missouri affirming a judgment recovered by a railway employee in an action for personal injuries, under the Federal Employers' Liability Act.

Mr. Frank H. Sullivan, with whom *Mr. Thos. P. Littlepage, Mr. William O. Reeder* and *Mr. Homer T. Dick* were on the brief, for petitioner.

Mr. Sidney Thorne Able and *Mr. P. H. Cullen,* for respondent, submitted. *Mr. Charles P. Noell* and *Mr. Walter L. Brady* were also on the brief.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The respondent Wolfe brought this action in a Circuit Court of Missouri to recover damages for personal injuries suffered by him while employed as the conductor

of a freight train on a railroad under federal control, basing his right of recovery upon the Employers' Liability Act in connection, primarily, with an alleged violation of the provisions of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended by the Act of March 2, 1903, c. 976, 32 Stat. 943. He had a verdict and judgment; and the judgment was affirmed by the Supreme Court of the State. 294 Mo. 170.

The petitioner contends that there was no evidence to take the case to the jury under the Safety Appliance Act and that it was erroneously held to be applicable in the situation presented.

Section 4 of the original act, as amended by the Act of 1903, provides that, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful to use on any railroad engaged in interstate commerce any car "not provided with secure grab irons or handholds in the ends and sides . . . for greater security to men in coupling and uncoupling cars." *Southern Railway* v. *United States*, 222 U. S. 20, 24.

It was undisputed that the carrier was engaged in interstate commerce and that Wolfe was employed in such commerce. As found by the Supreme Court of Missouri his evidence tended to show the following facts: While the freight train of which he was conductor was at a station, moving slowly, he was standing on the side of one of the cars, with his feet in a sill-step fastened to the bottom of the car within about a foot of its end, and holding on with his right hand to a grab iron or handhold directly over the sill-step and about three or four feet from it. This grab iron consisted of a round iron bar bent at the ends, which were bolted into the wooden side of the car. The wood had rotted or been worn away, so that the bolts had a play or movement of about an inch, which made the grab iron loose and defective and permitted it to move to that extent. While thus standing on the sill-

step and holding on to the grab iron with his right hand, Wolfe signalled the fireman with his left hand to stop the train. But instead of stopping it moved forward with a violent jerk at accelerated speed, and by reason of the movement of the loose grab iron to which Wolfe was holding, he was caused to fall to the ground beside the car and one of its wheels ran over his left arm and injured it so that it had to be amputated at the shoulder joint. It was, furthermore, not unusual for conductors or brakemen to stand in the sill-step and hold on to the grab iron to signal orders as to the movement of the train. The loose condition of the grab iron was not disputed.

The argument in behalf of the petitioner is, in substance, that on these facts Wolfe was not in a situation where the defective grab iron operated as a breach of duty imposed for his benefit by § 4 of the act, which, it is urged, merely requires the furnishing and maintenance of grab irons in behalf of employees engaged in coupling or uncoupling cars or a service connected therewith, and does not require them as a means of, or aid to, the transportation of employees.

While there is no previous decision of this Court relating to this aspect of § 4, a controlling analogy is to be found in its decisions as to the application of § 2 of the act, which, as amended, makes it unlawful to use on a railroad engaged in interstate commerce any car not equipped with automatic couplers capable of being coupled and uncoupled "without the necessity of men going between the ends of the cars." This section has been considered in four cases in which the injured employees were not engaged either in coupling or uncoupling or in any service connected therewith.

In *St. Louis Railroad* v. *Conarty,* 238 U. S. 243, a switch engine ran, in the dark, into a standing car whose coupler and drawbar had been pulled out, and the engine,

in the absence of these appliances, coming in immediate contact with the end of the car, a switchman riding on the footboard of the engine was caught between it and the body of the car; and in *Lang* v. *New York Central Railroad,* 255 U. S. 455, through failure to stop in time a string of cars that had been kicked in on a siding, it ran into a standing car whose coupler attachment and bumpers were gone, and the brakeman on the end of the string of cars was caught between the car on which he was riding and the standing car. In these cases it was held that, the collisions not being proximately attributable to the absence of automatic couplers on the standing cars, the carriers were not liable for the injuries received by the employees, even if the collisions would not have resulted in injuries to them had the couplers been on the standing cars, the requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision through other causes.

In *Louisville Railroad* v. *Layton,* 243 U. S. 617, the failure of couplers to work automatically in a switching operation resulted in a collision of cars, from one of which a brakeman was thrown while preparing to release brakes; and in *Minneapolis Railroad* v. *Gotschall,* 244 U. S. 66, a brakeman was thrown from a train as the result of defective couplers coming open while the train was in motion. In these cases, the defect in the couplers being in each the proximate cause of the injury, it was held that the employees were entitled to recover. In the *Layton Case* the Court, after specifically distinguishing the *Conarty Case* on the ground that in that case the collision resulting in the injury was not proximately attributable to a violation of the act (p. 620), said:

"While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple

and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty." (p. 621.)

The doctrine of this case was explicitly recognized in the *Lang Case,* in which the *Layton Case* was distinguished, on the facts, on the ground that "necessarily there must be a causal relation between the fact of delinquency and the fact of injury" (p. 459).

The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

This construction of the act is substantially that given by the Circuit Courts of Appeals of the Second, Fourth and Sixth Circuits in *Director General* v. *Ronald*

(C. C. A.), 265 Fed. 138; *Philadelphia Railway* v. *Eisenhart* (C. C. A.), 280 Fed. 271, and *McCalmont* v. *Pennsylvania Railroad* (C. C. A.), 283 Fed. 736; and by the state courts in *McNaney* v. *Chicago Railway,* 132 Minn. 391, and *Ewing* v. *Coal Railway Co.,* 82 W. Va. 427.

It results that in the present case, as there was substantial evidence tending to show that the defective condition of the grab iron required by § 4 of the Safety Appliance Act was a proximate cause of the accident resulting in injury to Wolfe while in the discharge of his duty as a conductor, the case was properly submitted to the jury under the act; and the issues having been determined by the jury in his favor the judgment of the trial court was in that behalf properly affirmed.

The judgment of the Supreme Court of Missouri is accordingly

Affirmed.

CANUTE STEAMSHIP COMPANY, LTD., ET AL. *v.* PITTSBURGH & WEST VIRGINIA COAL COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 72. Argued October 12, 15, 1923.—Decided November 12, 1923.

Under the Bankruptcy Act §§ 3b, 59b, 59f, where a petition for involuntary bankruptcy, filed by three petitioners, is sufficient on its face, alleging that they are creditors with provable claims, and containing all averments essential to its maintenance, other creditors having provable claims who intervene in the proceeding and join in the petition at any time during its pendency before an adjudication is made, after as well as before the expiration of four months from the alleged act of bankruptcy, are to be counted at the hearing in determining whether there are three petitioning creditors qualified to maintain the petition, it being immaterial in such case whether the three qualified creditors joined in the petition originally or by intervention. P. 247.

283 Fed. 108, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming an adjudication of bankruptcy made by the District Court.

Mr. Charles R. Hickox, with whom *Mr. D. M. Tibbetts* was on the brief, for petitioners.

Mr. Thomas F. Barrett and *Mr. Theodore Kiendl,* with whom *Mr. John W. Davis, Mr. Nash Rockwood, Mr. R. H. McNeill, Mr. R. R. Bennett* and *Mr. T. L. Jeffords* were on the briefs, for respondents.

Mr. Bernard S. Barron filed a brief for the receiver in behalf of general creditors.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case involves an adjudication in bankruptcy made under an involuntary petition which was opposed by intervening creditors.

In February, 1921, three of the respondents, the Pittsburgh & West Virginia Coal Company and two other coal companies, filed in a Federal District Court in New York a petition for the involuntary bankruptcy of the Diamond Fuel Company, alleging that it was insolvent and had committed an act of bankruptcy within four months prior thereto, and that they were creditors having provable claims against it. The petition was regular and sufficient on its face. The Fuel Company answered, denying that it was insolvent or had committed an act of bankruptcy, or that the Pittsburgh Company, one of the petitioners, was its creditor and had a provable claim against it.

In September, 1921, more than nine months after the date of the alleged act of bankruptcy, before any further proceedings had been had other than the appointment of a receiver, two other creditors of the Fuel Company by leave of the court intervened in the proceeding and joined as

petitioning creditors in the petition for bankruptcy. Eleven days thereafter the present petitioners, the Canute Steamship Co., Ltd., and Compania Naviera Sota Y Aznar, hereinafter called the opposing creditors, being creditors of the Fuel Company claiming to have acquired a lien upon its funds by attachment proceedings instituted within four months before the filing of the original petition, by leave of the court likewise intervened in the proceeding in opposition to the petition for bankruptcy, and filed answers denying its averments in like manner as in the answer of the Fuel Company.

On the hearing before the District Court on pleadings and proof, the Fuel Company withdrew its answer and consented to an adjudication. The case was then heard on the issues raised by the answers of the opposing creditors. The District Judge, intimating, but not determining, that by reason of certain matters not necessary to be recited, the opposing creditors were estopped from denying that the Pittsburgh Company was a creditor, held that, independently of this question, any defect of parties which might otherwise have resulted was cured by the joinder of the two intervening creditors having valid claims; and, finding that the allegations of the petition for bankruptcy were otherwise sustained by the proof, an order was entered adjudging the Fuel Company a bankrupt. Upon appeal by the opposing creditors, the Circuit Court of Appeals, assuming, but not deciding, that the Pittsburgh Company was not a creditor, nevertheless affirmed the order of adjudication on the ground that the question of its claim was immaterial in view of the joinder of the intervening petitioners supplying the requisite number of creditors. 283 Fed. 108.

The opposing creditors contend that this was error upon the ground that under the provisions of the Bankruptcy Act (30 Stat. 544), the petition in bankruptcy could not properly be sustained except upon a finding that the Pitts-

burgh Company was a creditor of the Fuel Company having a provable claim against it, so as to make up the required number of three original petitioners entitled to maintain the petition; and that, in the absence of such finding, this lack could not be cured by the joinder of the other petitioning creditors more than four months after the commission of the act of bankruptcy.

The pertinent provisions of the act are these: Section 3b provides that a petition may be filed against a person who is insolvent and has committed an act of bankruptcy within the preceding four months; § 59b, that three or more creditors who have provable claims against any person of a specified aggregate amount—or if all the creditors of such person are less than twelve in number, then one of such creditors whose claim equals the specified amount—may file a petition to have him adjudged a bankrupt; and § 59f, that "Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

It was not averred in the petition for bankruptcy that the creditors of the Fuel Company were less than twelve in number; nor is this claimed. And no question is made as to the aggregate amount of the claims involved.

The argument in behalf of the opposing creditors is, in effect, that under § 3b a petition for involuntary bankruptcy must be filed within four months after the commission of the act of bankruptcy; that under § 59b, unless the creditors are less than twelve in number, to give the court jurisdiction the petition must be filed by not less than three creditors having provable claims; and that where less than three of the original petitioners are in fact such creditors, the joinder in the petition more than four months after the commission of the act of bankruptcy of intervening creditors having such claims, is in substance an amendment of the original petition, equiva-

lent to the filing of a new petition, which does not validate the original petition *ab initio* or authorize an adjudication of bankruptcy to be made under it based upon an act of bankruptcy committed more than four months before the requisite number of creditors entitled to maintain it had become petitioners.

However, the filing of a petition, sufficient upon its face, by three petitioners alleging that they are creditors holding provable claims of the requisite amount, the insolvency of the defendant and the commission of an act of bankruptcy within the preceding four months, clearly gives the bankruptcy court jurisdiction of the proceeding. *Re New York Tunnel Co.* (C. C. A.), 166 Fed. 284, 285; *Re Bolognesi* (C. C. A.), 223 Fed. 771, 772. And while, under § 59b, as held in *Cutler* v. *Ring Co.* (C. C. A.), 264 Fed. 836, 838, it is indispensable to the maintenance of the petition that the existence of three petitioners holding provable claims be established, if challenged, the argument in behalf of the opposing creditors erroneously assumes that these must be three original petitioners, and fails to give due weight to the plain provisions of § 59f supplementing and modifying the provisions of § 59b in this respect. Section 59f provides in unambiguous language that creditors other than the original petitioners may "at any time" enter their appearance and "join in the petition." The right thus conferred is not limited to the period of four months after the commission of the act of bankruptcy alleged in the petition, either expressly or by implication; the only limitations as to point of time being those necessarily implied, that, on the one hand, the petition cannot be joined in after it has been dismissed and is no longer pending, and that, on the other hand, it must be joined in before the adjudication is made. Such intervention by other creditors is not an amendment to the original petition or equivalent to the filing of a new petition, but is, in the specific language of the act, a

" joining in " the original petition itself. And other creditors thus joining in the original petition necessarily acquire the status of petitioning creditors as of the date on which the original petition was filed, and may thereafter avail themselves of its allegations, including those relating to the commission of the act of bankruptcy, as fully as if they had been original petitioners.

We therefore conclude that where a petition for involuntary bankruptcy is sufficient on its face, alleging that the three petitioners are creditors holding provable claims and containing all the averments essential to its maintenance, other creditors having provable claims who intervene in the proceeding and join in the petition at any time during its pendency before an adjudication is made, after as well as before the expiration of four months from the alleged act of bankruptcy, are to be counted at the hearing in determining whether there are three petitioning creditors qualified to maintain the petition, it being immaterial in such case whether the three qualified creditors joined in the petition originally or by intervention.

The decisions in the Circuit Courts of Appeals and District Courts are to this effect: *Re Stein* (C. C. A.), 105 Fed. 749; *Re Bolognesi* (C. C. A.), *supra*, p. 773; *Re Romanow* (D. C.), 92 Fed. 510; *Re Mammouth Lumber Co.* (D. C.), 109 Fed. 308; *Re Mackey* (D. C.), 110 Fed. 355; *Re Charles Town Light Co.* (D. C.), 183 Fed. 160. And see *Re Plymouth Cordage Co.* (C. C. A.), 135 Fed. 1000; *Stevens* v. *Mercantile Co.* (C. C. A.), 150 Fed. 71; *Ryan* v. *Hendricks* (C. C. A.), 166 Fed. 94; *First State Bank* v. *Haswell* (C. C. A.), 174 Fed. 209; *Re Etheridge Furniture Co.* (D. C.), 92 Fed. 329; *Re Bedingfield* (D. C.), 96 Fed. 190; *Re Gillette* (D. C.), 104 Fed. 769; *Re Vastbinder* (D. C.), 126 Fed. 417; and *Re Crenshaw* (D. C.), 156 Fed. 638. The cases of *Despres* v. *Galbraith* (C. C. A.), 213 Fed. 190, and *Trammell* v. *Yarbrough* (C. C. A.), 254 Fed. 685, upon which the opposing credi-

tors chiefly rely, are clearly distinguishable in their essential aspects. In the *Despres Case* the original petition had been dismissed and the intervening creditors did not join in it but filed a new petition; and, despite the somewhat broad language used in the opinion, it was obviously not intended to modify or overrule the prior decision of the same court in *First State Bank* v. *Haswell, supra,* which was cited with approval (p. 192). And in the *Trammell Case* other creditors were not permitted to reopen a proceeding in which the original petition had been dismissed, as being not an intervention in a pending proceeding but the institution of a new one.

The question, upon which the decisions show a conflict of opinion, as to the joinder of an intervening creditor in an original petition insufficient upon its face, is not here involved and is not determined.

Finding, for the foregoing reasons, no error in the decree of the Circuit Court of Appeals, it is

Affirmed.

BUNCH *v.* COLE ET AL.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 33. Submitted March 16, 1923.—Decided November 19, 1923.

When a lease of an Indian allotment made by the allottee in excess of the powers of alienation allowed him by acts of Congress, is declared by those acts to be absolutely null and void, a state statute which, as applied by the state court, gives it effect as creating a tenancy at will and as controlling the amount of compensation which the allottee may recover for the use and occupation of the land by the persons named as lessees, is to that extent invalid under Article VI, cl. 2, of the Constitution. P. 253.

85 Okla. 38, reversed; certiorari dismissed.

ERROR to a judgment of the Supreme Court of Oklahoma which reversed a judgment recovered by the present

plaintiff in error in a trial court, in his action to recover for wrongful use and occupation of his allotted land.

Mr. Dennis T. Flynn, Mr. Robert M. Rainey and *Mr. Streeter B. Flynn,* for plaintiff in error and petitioner. *Mr. William Neff* and *Mr. Lewis E. Neff* were also on the briefs.

Mr. Benjamin Martin, Jr., for defendants in error and respondents.

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action by an Indian allottee to recover for a wrongful occupancy and use of his land.

The plaintiff was an adult Cherokee Indian of the full blood, enrolled and recognized as a member of the tribe and still a ward of the United States. The land was an eighty-acre tract which had been allotted to him in the division of the tribal lands,—forty acres as a homestead and the remainder as surplus land. He had full title, but his power to alien or lease was subject to restrictions imposed by Congress for his protection. By three successive instruments, each given for a cash rental of $75, he leased the land, both homestead and surplus, to the defendants for agricultural purposes. The first lease was given late in 1915 for a term of one year beginning January 1, 1916; the second was given early in July, 1916, for a term of one year beginning January 1, 1917, and the third was given late in July, 1917, for a term of one year beginning January 1, 1918. The defendants went into possession under the leases, and in 1917 and 1918 sublet the land to others. From the subletting the defendants realized $890.40 in 1917, and $384.35 in 1918, these sums representing the actual rental value on a crop-sharing basis in those years.

The action was begun in 1919 on the theory that the leases were made in violation of the restrictions imposed

by Congress, and therefore were wholly void. At first a recovery was sought for all three years, but afterwards the claim for 1916 was dropped. On the trial the court treated the leases for 1917 and 1918 as void, but ruled that the plaintiff had waived the invalidity of the lease for 1917 by not promptly objecting to any occupancy or use under it, and so could not recover for that year. A recovery was had for 1918 of a sum conforming to what the defendants had realized from the subletting for that year, with interest. Both parties appealed to the Supreme Court of the State, and it reversed the judgment with a direction that no recovery be allowed for either year. 85 Okla. 38. That court treated the leases for both years as void; but construed and applied a statute of the State as in effect requiring that the leases be regarded as creating a tenancy at will and controlling the amount which the plaintiff was entitled to demand and receive. This was done over his objection that the state statute, so construed and applied, was in conflict with the congressional restrictions, and therefore was invalid. The plaintiff prosecutes this writ of error. Upon his petition a writ of certiorari was granted, 260 U. S. 716, but as it appears that the writ of error was well grounded, the writ of certiorari will be dismissed.

The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course it is not competent for a State to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 316; *Monson* v. *Simonson*, 231 U. S. 341, 347; *Brader* v. *James*, 246 U. S. 88, 96; *Mullen* v. *Pickens*, 250 U. S. 590, 595.

An examination of the several enactments by which Congress has restricted the leasing of Cherokee allotments

for agricultural purposes [1] discloses that when the leases in question were given the situation was as follows:

1. An adult allottee of the full blood could lease the homestead for not exceeding one year, and the surplus for not exceeding five years, without any approval of the lease, but could not lease for longer periods without the approval of the Secretary of the Interior.

2. Any lease not permitted by the restrictions was to be "absolutely null and void."

The permission given to lease for limited periods without approval was not intended to authorize the making of leases which were to begin at relatively distant times in the future, but only the making of such as were to take effect in possession immediately or, what was equally within the spirit of the permission, on the termination of an existing lease then about to expire. *United States* v. *Noble,* 237 U. S. 74, 82–83. And see *Dowell* v. *Dew,* 1 Younge & Collier's C. C. 345, 357; same case on appeal, 7 Jurist, 117.

It is conceded, and we think rightly so, that the leases for 1917 and 1918 fell outside the permission given. Both covered the homestead as well as the surplus land; both were made midway during the term of a like lease theretofore given and were to take effect in possession on the expiration of that lease, and neither was approved by the Secretary of the Interior. Being outside the permission, they were, as declared in the restricting provision, "absolutely null and void."

Obviously a lease which Congress, in the exertion of its power over land allotted to an Indian ward, pronounces absolutely void cannot be validated or given any force by a State; and a state statute which requires that such a

[1] Act of July 1, 1902, c. 1375, § 72, 32 Stat. 716, 726; Act April 26, 1906, c. 1876, §§ 19 and 20, 34 Stat. 137, 144; Act May 27, 1908, c. 199, §§ 2 and 5, 35 Stat. 312.

lease be regarded as effective for any purpose is necessarily invalid in that respect. *Monson* v. *Simonson, supra; Mullen* v. *Pickens, supra.*

The Supreme Court of the State, although recognizing the invalidity of the leases under the congressional restrictions, construed and applied a statute of the State (§3783, Rev. Laws 1910) as in effect requiring that the leases be regarded as creating a tenancy at will and controlling the compensation which the allottee could demand and the defendants should pay for the occupancy and use of the land. We of course must treat the local statute as intended to operate as that court says it does, and must determine its validity on that basis. In that view of it, we think the conclusion is unavoidable that it gives force and effect to leases which a valid enactment of Congress declares shall be of no force or effect, and that in this respect it must be held invalid under Article VI, cl. 2, of the Constitution of the United States.

The state court was persuaded that its conclusion had support in decisions dealing with leases made between parties entirely competent to make them but not executed in conformity with local laws, such as the statute of frauds. But decisions of that class are not apposite. These leases were made in violation of a congressional prohibition. They were not merely voidable at the election of the allottee, but absolutely void and not susceptible of ratification by him. Nothing passed under them and none of their provisions could be taken as a standard by which to measure the compensation to which the allottee was entitled for the unauthorized occupancy and use of his land.

It is not our province to enquire particularly into the need for the protection intended to be afforded by the restrictions, but, if it were, the need would find strong illustration in this case; for it appears that each of the leases was obtained for a cash rental of $75 and that when

the time arrived for assuming possession under them the defendants readily sublet the land on terms which netted them $890.40 in 1917 and $384.35 in 1918, the latter year being one of pronounced drought.

Judgment reversed on writ of error. Writ of certiorari dismissed.

CRAIG *v.* HECHT, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 82. Argued October 17, 1923.—Decided November 19, 1923.

1. A circuit judge, as such, has no power to grant the writ of *habeas corpus*. P. 271.
2. A final order discharging a petitioner in *habeas corpus*, made at chambers by a circuit judge exercising by designation the power of the District Court, or by a district judge, is reviewable on appeal by the Circuit Court of Appeals. P. 274.
3. In an ordinary contempt proceeding the District Court has jurisdiction to decide whether the evidence established an offense within the statute and whether the respondent was guilty as charged, and its order sentencing him to imprisonment is reviewable by appeal, and not by *habeas corpus*, which cannot be used as a substitute for appeal, in the absence of exceptional circumstances. P. 277.

282 Fed. 138, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing an order in *habeas corpus* which discharged the petitioner, Craig, from custody under a commitment issued by the District Court in a contempt proceeding. The order of discharge was made by a circuit judge, assigned to the District Court, who directed that it be recorded in that court.

Mr. Edmund L. Mooney, with whom *Mr. George P. Nicholson, Mr. Charles T. B. Rowe, Mr. Frank I. Tierney*

and *Mr. Russell Lord Tarbox* were on the brief, for petitioner.

I. The district court acted beyond its jurisdiction, because petitioner's act was not "misbehavior," and did not, and could not, "obstruct" the administration of justice.

II. The circuit judge had jurisdiction to issue the writ of *habeas corpus*. The mere fact that a court is merged does not deprive the judge, whose office still continues, of any jurisdictional power vested in him, *qua* judge. By the Habeas Corpus Act of 1867, 14 Stat. 385, the authority to issue the writ was vested in the "several courts of the United States and the several justices and judges of such courts within their respective jurisdictions," and subsequently, on the appointment of circuit judges, by the Act of April 10, 1869, 16 Stat. 44, and the still later codification in the Revised Statutes, the jurisdiction to issue the writ was vested in "the Supreme Court and the circuit and district courts," Rev. Stats., § 751, and upon "the several justices and judges of the said courts," *id.*, § 752; and again by §§ 754, 755, 757, 758, 760–763, the jurisdictional power of the justices and judges is repeated. These justices and judges are described in the Revised Statutes as "the several justices and judges of the said courts," but since they were in fact "Justices of the Supreme Court," and "circuit judges" and "district judges," this was but a short way of describing the officers in whom was vested the jurisdictional authority. The statute might as well have read, and, in the ordinary vernacular, would have read "the Justices of the Supreme Court, the circuit judges and the district judges," or "United States judge," as in § 6 of the Chinese Exclusion Act of 1862, or "judge of the United States," as in § 1014, Rev. Stats., which would have had the same meaning as the words actually employed. The object and purpose of the applicable provisions of the Judicial Code were to get

rid of superfluous courts, court officers and records, not to circumscribe the jurisdictional power of the judges. *Whitney* v. *Dick,* 202 U. S. 132, distinguished.

The jurisdictional powers of the court and those of the judge are distinct. *United States* v. *Clarke,* 1 Gall. 497. The reluctance of a judge to discharge a person committed by a judge of coördinate jurisdiction, *In re Hale,* 139 Fed. 496, would not apply in the same degree to a circuit judge reëxamining the act of a district judge. The only "other and appropriate sources of judicial power," *Ex parte Tracy,* 249 U. S. 551, are Justices of the Supreme Court and the Supreme Court itself, which should be relieved of such applications whenever possible.

The policy of the United States has been in the direction of extending and not of abridging the advantages of the writ of *habeas corpus.* The Constitution provides that "the privilege of the writ . . . shall not be suspended." *Ex parte Milligan,* 4 Wall. 2. This policy is further evidenced by the acts of Congress in conferring wide jurisdiction. Judiciary Act September 24, 1789, § 14; *Ex parte Bollman,* 4 Cr. 75; Act March 2, 1833, § 7, 4 Stat. 634; Habeas Corpus Act February 5, 1867, 14 Stat. 385; *Ex parte McCardle,* 6 Wall. 318; *Whitney* v. *Dick,* 202 U. S. 132, 136. When the circuit judges were appointed under the Act of 1869, *supra,* there was conferred upon them all of the powers of Supreme Court Justices within their respective circuits, one of which was the power to issue writs of *habeas corpus,* which always inhered in the office of Supreme Court Justice. The circuit judges received a baptism of power to issue this writ at the moment of their appointment; and this power did not originate in or spring from the panoply of a court.

The Act of 1869, providing for the appointment of circuit judges, was reënacted in substance in § 607, Rev. Stats. The Habeas Corpus Act of 1867 was transposed

into §§ 751, 752, Rev. Stats. This revision of the language of the Habeas Corpus Act, without any apparent intention to change its effect, brought about no substantial change in the law, so that the specification of the several courts of the United States as "the Supreme Court and the circuit court and district courts" meant substantially what it did in the first place in the Habeas Corpus Act, namely, that the power was conferred upon the "several justices and judges of the said courts," to wit, the Supreme Court and the District Courts, as expanded by the Act of 1869, appointing circuit judges and giving them the same power, within their jurisdiction, as Supreme Court Judges. There never has been an express change in the Habeas Corpus Act of 1867, except in its revision by the Revised Statutes. The *habeas corpus* provisions remain exactly as they were.

It is an "elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible." *Ex parte United States,* 226 U. S. 420. This Court has shown no tendency to restrict the "appropriate sources of judicial power" to issue the writ. *Ex parte Tracy,* 249 U. S. 551.

A very material consideration, we submit, is that when circuit judges were created no new court was created—the circuit court was already in existence. As the circuit judges did not derive their origin from a court, it is hard to see how they could lose any of their powers, as judges, by the abolition or merger of the court in which they usually sat.

The holding of the lower court is, in effect, that by the abolition or merger of the circuit court, the circuit judges were shorn of all of their powers—nothing was left to them except their bare titles—and that they were reclothed with the power, and only with the power, to sit

on the bench of the Circuit Courts of Appeals. We know, however, that they retained jurisdiction to sit under the Expedition Act, *Ex parte United States, supra;* and under the Chinese Exclusion Act of 1892, § 6. *Fong Yue Ting* v. *United States,* 149 U. S. 698. They are comprehended within the category of "any justice or judge of the United States" in § 1014, Rev. Stats., relating to the arrest and holding or bail of persons accused of crime. They also may, without designation, grant injunctions or restraining orders in cases pending in the district courts of their circuits (Jud. Code, § 264) and, upon designation by the President, act as a judge of the Court of Customs Appeals. Jud. Code, § 188. As the circuit judges retained these several powers as judges, under the separate acts conferring them, notwithstanding the abolition or merger of the circuit courts by the Judicial Code, how can it be said that they were, by the Judicial Code, shorn of the power conferred by the separate Habeas Corpus Act, unrepealed, to issue the great writ, which they had exercised in numberless instances covering over half a century?

It would be a violent assumption that in dispensing with the machinery of a court, Congress intended to strip the judges thereof of their own inherent powers, especially where the act was not to be "construed to prevent any circuit judge holding district court or serving in the commerce court, or otherwise, as provided for and authorized in other sections of this Act." Jud. Code, § 118. The exercise of this power by a circuit judge is well exampled in the leading case before this court of *Carper* v. *Fitzgerald;* 121 U. S. 87.

In the present case, Circuit Judge Manton was the regularly acting judge holding the chambers part of the district court, under designation when the writ was issued. He was the judge before whom it was our duty to go and he was the judge whose business it was—using the word in its proper sense—to issue the writ.

But, though thus designated, the point of the jurisdiction and power of a circuit judge to issue a writ of *habeas corpus* is necessarily involved, for only by holding that a circuit judge had no such jurisdiction or power, and that the order was an order of the district court, did the court below assert jurisdiction to hear and decide the appeal, notwithstanding the petitioner's motion to dismiss the appeal.

III. In issuing the writ, the circuit judge, in addition to his powers as such, was exercising the powers of a district judge, under designation. *Ex parte United States,* 226 U. S. 420. His order was not a court order, but a judge's order. *Carper* v. *Fitzgerald, supra.*

It will be observed that § 18, Jud. Code, provides for designation of the circuit judge, but the following section does not limit the judge so designated to holding the court; it provides that "all the acts and proceedings . . . by or before him, in pursuance of such provisions, shall have the same effect and validity as if done by or before the district judge of the said district." The designation in this case follows the lines of the statute.

A circuit judge can no more lay aside his title and powers of circuit judge than could he be stripped of them; he is always a circuit judge. *McCarron* v. *People,* 13 N. Y. 74.

Even if this Court shall hold that a circuit judge has no power, as such, to grant a writ of *habeas corpus,* he may have the power, under Rev. Stats., § 752 whenever he is a judge of the district court. Where Congress has committed jurisdiction to a judge as a judicial tribunal, he functions through his own inherent power and not through or on behalf of the court of which he is a member. *United States* v. *Duell,* 172 U. S. 576; *Carper* v. *Fitzgerald, supra.*

IV. The decisions are uniform that no appeal lay to the Circuit Court of Appeals from an order of a judge; that

only an order of a court might be reviewed by appeal or writ of error. *Carper* v. *Fitzgerald, supra; In re Lennon,* 150 U. S. 393; *McKnight* v. *James,* 155 U. S. 685; *Lambert* v. *Barrett,* 157 U. S. 697; *Ex parte Jacobi,* 104 Fed. 681; *Harkrader* v. *Wadley,* 172 U. S. 148.

V. This Court had exclusive jurisdiction, by direct appeal, to review the order discharging the petitioner, which was based upon a finding that the petitioner had been deprived of his liberty by an excess of power, involving the construction and application of the Constitution. The assumption of jurisdiction by the Circuit Court of Appeals warrants and requires the intervention of this Court. Jud. Code, § 238; *Raton Water Works Co.* v. *Raton,* 249 U. S. 552, and other cases.

VI. If the Circuit Court of Appeals had no jurisdiction to review the order of a circuit judge, its determination should be reversed regardless of the question whether the district court acted in excess of its powers, and regardless, also, of whether *habeas corpus* was the proper remedy, leaving those questions to be reviewed by appropriate procedure. *First National Bank* v. *Chicago Title & Trust Co.,* 198 U. S. 280.

VII. *Habeas corpus* was the proper and effective remedy for excess of power or lack of jurisdiction in the commitment for asserted contempt. *Ex parte Hudgings,* 249 U. S. 378; *In re Watts and Sachs,* 190 U. S. 1; *Cuyler* v. *Atlantic & N. C. R. R. Co.,* 131 Fed. 95; *In re Reese,* 98 Fed. 984; *Ex parte Dock Bridges,* 2 Woods, 428; *Ex parte Lange,* 18 Wall. 163; *Ex parte Siebold,* 100 U. S. 371; *Ex parte Fisk,* 113 U. S. 713; *In re Ayers,* 123 U. S. 443; *Nielsen, Petitioner,* 131 U. S. 176; *Cuddy, Petitioner,* 131 U. S. 280; *In re Mayfield,* 141 U. S. 107; *Ex parte Robinson,* 144 Fed. 835; *Ex parte Bigelow,* 113 U. S. 328; *In re Belt,* 159 U. S. 95; *Hyde* v. *Shine,* 199 U. S. 62.

VIII. The disregard, by the court below, of the statutory proviso of punishment for obstructive misbehavior,

only, and the limitations sought to be placed by the court below on the scope of the writ of *habeas corpus,* are not in accord with the rulings of this Court. Jud. Code § 268; *Brass Crosby, Lord Mayor of London,* 3 Wilson, 188; *Ex parte Robinson,* 19 Wall. 505, referred to.

Ex parte Kearney, 7 Wheat. 38, and *Ex parte Watkins,* 3 Pet. 193, were decided before the Act of 1831 (now Jud. Code, § 268), which introduced the proviso of obstructive misbehavior as the basis of contempt, and are no longer applicable.

We freely concede that the writ of *habeas corpus* may not be employed as an anticipatory writ of error, such as was discountenanced in *Henry* v. *Henkel,* 235 U. S. 219; *Rumely* v. *McCarthy,* 250 U. S. 283, and similar cases. But generally the rule of procedure for which such cases stand is quite beside the right to attack by writ for lack of jurisdiction or excess of power. *Ex parte Parks,* 93 U. S. 18; *Ex parte Yarbrough,* 110 U. S. 651; *Ex parte Siebold,* 100 U. S. 375; *United States* v. *Pridgeon,* 153 U. S. 48; *Ex parte Lange,* 18 Wall. 163; *Ex parte Hudgings,* 249 U. S. 378.

Even though the only question that the court on *habeas corpus* can look into is one of jurisdiction, broadly considered, the cases show that the court may look into the facts upon which the conviction was based, to the extent that they affect the jurisdiction of the court which assumed to make the adjudication. *In re Mayfield,* 141 U. S. 107; *Cuddy, Petitioner,* 131 U. S. 280.

IX. The objections raised to the form of the writ were unavailing to oust the circuit judge of power to act.

Mr. Solicitor General Beck, with whom *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, was on the brief, for respondent.

I. The judgment of conviction rendered by the district court was final and conclusive until reversed on writ of error.

The court had jurisdiction of the person of the offender and of the offense, and the sentence imposed was within its power, both inherent and as confirmed by the statute. *Ex parte Robinson,* 19 Wall. 505; *In re Debs,* 158 U. S. 565; *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402.

The authority conferred by Jud. Code, § 268, clearly embraced the offense. No issue of jurisdiction is left. The petitioner urged certain issues of law and fact as affecting the jurisdiction, but every one of these was open to review on appeal to this Court, as the judgment of conviction was unquestionably a final decision. Jud. Code, § 128; *Bessette* v. *Conkey Co.,* 194 U. S. 324. Assuming that the trial court's determination of every one of these questions was erroneous, none of them would be within the scope of *habeas corpus. Ex parte Watkins,* 3 Pet. 193; *Riddle* v. *Dyche,* 262 U. S. 333.

II. The matters litigated before Judge Manton did not involve the jurisdiction of the court which tried and sentenced the petitioner, and the proceedings amounted to a mere review on the merits for which an appeal was the proper remedy.

The law is that the findings of the trial court may not be attacked collaterally, nor can the record be examined to see whether there is evidence warranting a conviction. *Harlan* v. *McGourin,* 218 U. S. 442; *Ex parte Carll,* 106 U. S. 521; *In re Debs,* 158 U. S. 565; *Matter of Gregory,* 219 U. S. 210.

III. The writ of *habeas corpus* may not be used as a substitute for an appeal. The court on *habeas corpus* is limited to jurisdictional questions. *Glasgow* v. *Moyer,* 225 U. S. 420; *Matter of Gregory, supra; Ex parte Watkins,* 3 Pet. 193; *Ex parte Parks,* 93 U. S. 18; *Harlan* v. *McGourin, supra.*

To warrant discharge on *habeas corpus,* the judgment, upon which the commitment is based, must be not merely

erroneous, but absolutely void. This proposition excludes from consideration any error, however vital or prejudicial it may be deemed. The remedy for error is by appeal. The cases on this proposition are so varied and so strongly stated as to leave no doubt of their purport or effect. *Ex parte Watkins,* 3 Pet. 193; *Ex parte Parks,* 93 U. S. 18; *Ex parte Yarbrough,* 110 U. S. 651; *Ex parte Spencer,* 228 U. S. 652; *Ex parte Siebold,* 100 U. S. 371.

While it may be admitted that to some extent a contempt case is *sui generis,* nevertheless it is governed by the general rules applicable to appeals and writs of error. *Habeas corpus* is not the method of review provided for contempt cases or any class of cases. *Ex parte Kearney,* 7 Wheat. 38.

The case at bar is plainly within the general rule. Judge Manton accepted the contentions of the petitioner in two respects. He placed an innocuous interpretation upon the letter which was the basis of the contempt charge, and he decided that there was nothing pending *sub judice* when the letter was published. That is, he reversed Judge Mayer's findings of fact, and made contrary findings. But the sufficiency of the evidence was not before him. It is clearly distinguished from jurisdictional questions. *Harlan* v. *McGourin,* 218 U. S. 442, and other cases cited above.

If the proposition might properly be argued here, it could easily be demonstrated that the publication was contemptuous.

As to the contention that there was nothing pending *sub judice* at the time of the publication, if it be assumed that this is an essential element of the crime, it is to be determined, like every other element, by the trial court. The determination of that court, if erroneous, might be corrected on appeal. If we were at all concerned with that question here (and we are not), it might be pointed

out that the contemptuous criticism was not limited to a single past order, but referred to a continuing policy in the receivership, which was undoubtedly pending, to many orders made in that receivership; and the writer sought to procure the entry of other orders in the future. This question was carefully considered and effectively disposed of by the trial court in its opinion.

The exceptions to the general rule as to the scope of *habeas corpus* do not include the case at bar. There are only five classes of cases in which the court on *habeas corpus* will go beyond the question of jurisdiction. (1) Where there is a conflict of jurisdiction between a State and the United States; (2) where the authority and operations of the Federal Government are or may be interfered with by state action; (3) where rights or obligations of the United States under a treaty are involved; (4) where the petitioner is held under state process based upon state law which is in violation of the Constitution; and (5) where the judgment or order under which he is held is a nullity because in excess of the power of the court. This classification is based upon an analysis of *Henry* v. *Henkel,* 235 U. S. 228, and the cases there cited.

The first and second exceptions are closely related. The fundamental reason for the first four exceptions is the necessity of employing *habeas corpus* in order expeditiously and adequately to maintain the supremacy of federal laws and treaties in compliance with § 2 of Art. VI of the Constitution. See *Tarble's Case,* 13 Wall. 397; *Tennessee* v. *Davis,* 100 U. S. 257; *In re Neagle,* 135 U. S. 1; *In re Watts and Sachs,* 190 U. S. 1.

Illustrations of the first and second exceptions are *In re Loney,* 134 U. S. 372, explained in *New York* v. *Eno,* 155 U. S. 89; *Tarble's Case, supra; Boske* v. *Comingore,* 177 U. S. 459; *In re Neagle, supra,* and possibly *In re Watts and Sachs, supra.* These are cases of urgency.

The third exception, essential to assure the fulfillment of treaty obligations and the proper conduct of foreign

relations, is illustrated in *In re Mayfield,* 141 U. S. 107, and is commented upon in *Ex parte Royall,* 117 U S. 241; *In re Neagle,* 135 U. S. 74; *Boske* v. *Comingore,* 177 U. S. 466; *In re Lincoln,* 202 U. S. 178.

As to the fourth exception, under which the validity of state laws, claimed to infringe the Federal Constitution, is sometimes tested on *habeas corpus, Ex parte Royall,* 117 U. S. 241, is the best example. The power of the court in this class of cases is purely discretionary. This subject is also discussed and the cases are collected in *In re Lincoln,* 202 U. S. 178.

In these four exceptional classes of cases the writ of *habeas corpus* is employed whenever the federal courts are confronted with the duty of maintaining the supremacy of the laws, the treaties, and the Constitution of the United States against attack by the States. The applicant for the writ in these cases has no absolute right to it, except where it is expressly given by statute. The granting of this extraordinary relief rests in the court's discretion and is exercised sparingly and only in an emergency.

Examples of the fifth exception, which may be called cases involving excess of power, are *Ex parte Lange,* 18 Wall. 163; *Nielsen, Petitioner,* 131 U. S. 176; and *Ex parte Hudgings,* 249 U. S. 378. The petitioner strives to bring himself within this exception.

The *Hudgings Case* presents no analogy to the case at bar. In *Ex parte Lange,* 18 Wall. 163, the judgment was not merely erroneous but absolutely void; as also in *Nielsen, Petitioner,* 131 U. S. 176. *Ex parte Bridges,* 2 Woods, 248, was substantially identical in facts with the *Loney Case,* 134 U. S. 372. *In re Mayfield,* 141 U. S. 107, plainly comes within the third exception. *In re Watts and Sachs,* 190 U. S. 1, the Court took jurisdiction by certiorari, and employed *habeas corpus* in aid of its juris-

diction. Assuming, however, that the case were one o *habeas corpus* alone, there was a direct conflict betweer the state and federal courts. The case is therefore within the first exception.

There is another situation sometimes occurring on *habeas corpus* that it may be suggested constitutes an exception to the general rule. It is not an exception, but if it were, it could have no application to the case at bar. Where there is a lack of jurisdiction in the lower court or its judgment is void, an appellate court, authorized to review its action on writ of error, may grant relief by *habeas corpus,* instead of remitting the applicant to his remedy by writ of error. *Ex parte Siebold,* 100 U. S. 371. But such power can be exercised, as is clearly shown in the *Siebold Case,* only by a court having supervisory jurisdiction, from which a writ of error would lie, and only when the judgment assailed is void. 100 U. S. 375. See also *Ex parte Spencer,* 228 U. S. 652.

As heretofore indicated, the enumerated exceptions are merely the instances in which, because of the absence of other forms of remedy, it is necessary to resort to *habeas corpus* in order to assure the rights of persons restrained of liberty, and are in effect mere interpretations of § 753, Rev. Stats.

IV. Since the circuit court was abolished, a judge of the Circuit Court of Appeals has no power to grant the writ of *habeas corpus. Whitney* v. *Dick,* 202 U. S. 132; *McLish* v. *Roff,* 141 U. S. 666; *Lau Ow Bew* v. *United States,* 144 U. S. 55; *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Ex parte Tracy,* 249 U. S. 551.

The so-called writ of *habeas corpus* was void. It is not addressed to anybody; it bears the seal of no court nor the signature of the clerk, and is merely signed "Martin T. Manton, U. S. C. J."

V. The order of Judge Manton was appealable to the Circuit Court of Appeals. That court regarded the order

discharging the petitioner from custody as an order of the district court, made by a judge sitting in that court, and therefore appealable. 282 Fed. 145. This conclusion, we submit, is sound in view of the facts shown by the record, and it is unnecessary to add anything to the reasoning on it of the judges of the Circuit Court of Appeals.

Even though the order be regarded as a judge's order, it was nevertheless appealable. *Webb* v. *York,* 70 Fed. 753; *United States* v. *Fowkes,* 53 Fed. 13; *Duff* v. *Carrier,* 55 Fed. 433; *In re Starr,* 56 Fed. 142; *United States* v. *Gee Lee,* 50 Fed. 271. *Carper* v. *Fitzgerald,* 121 U. S. 87, distinguished.

VI. Misuse of the writ of *habeas corpus* is becoming increasingly prevalent. This record presents the situation in a most aggravating form. Not only was there no attempt to review the conviction in the orderly manner prescribed by law, but, by deliberate avoidance of that method, an appeal to another judge was substituted, and the attempt was made to shape the proceedings so that no review of his decision could be had. The result has been intolerable delay, great and unnecessary expense, and an offender against the administration of justice still unpunished.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The opinions below are reported in 266 Fed. 230; 274 Fed. 177; 279 Fed. 900; 282 Fed. 138.

In October, 1919, petitioner Craig, Comptroller of New York City, wrote and published a letter to Public Service Commissioner Nixon, wherein he assailed United States District Judge Mayer because of certain action taken in receivership proceedings then pending. The United States District Attorney filed an information charging him with criminal contempt under § 268, Judicial Code.

Having heard the evidence, given the matter prolonged consideration and offered the accused opportunity to retract, on February 24, 1921—some fifteen months after the offense—Judge Mayer, holding the District Court, sentenced petitioner to jail for sixty days and committed him to the custody of the United States Marshal. Immediately, without making any effort to appeal, Craig presented his verified petition, addressed "To the Honorable Martin T. Manton, Circuit Judge of the United States," asking for a writ of *habeas corpus* and final discharge. The record of all evidence and proceedings before the District Court was annexed to or, by reference, made part of the petition. The judge promptly signed and issued the following writing, which bore neither seal of court nor clerk's attestation:

"The United States of America,
Second Judicial Circuit,
Southern District of New York. } ss.:

"We command you that the body of Charles L. Craig, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before Honorable Martin T. Manton, United States Circuit Judge for the Second Judicial Circuit, within the Circuit and District aforesaid, to do and receive all and singular those things which the said judge shall then and there consider of him in this behalf; and have you then and there this writ.

"Witness the Honorable Martin T. Manton, United States Circuit Judge for the Second Judicial Circuit, this 24th day of February, 1921, and in the 145th year of the Independence of the United States of America. Martin T. Manton, U. S. C. J."

The Marshal made return, and set up the contempt proceedings in the District Court along with the order of commitment. This was traversed; and Judge Manton heard the cause. He said and ruled—

"Was there a cause pending within the rule of contempt concerning libelous publications? A cause is pending when it is still open to modifications, appeal or rehearing and until the final judgment is rendered. Did the letter concern a cause pending? If it did not, it could not obstruct the administration of justice. The application before the court which is the subject matter of the letter was the matter of a co-receiver. As to this the court had definitely decided adverse to the Comptroller. The court's action was complete in respect to this matter. . . . The district judge pointed out, as did the information, that the whole railroad situation was before the court, since it was an equity proceeding, but it is not of this that the defendant wrote. This is fully corroborated by the testimony of the defendant. He also testified that he had no intention of obstructing the delivery of justice or misbehaving himself so as to obstruct the administration of justice. He stands convicted upon his letter alone and such inferences as may be drawn therefrom. His conviction rests upon an issue between the court and the defendant, and it is one of terminology or interpretation. There is no criminal intent discoverable from this record to support the interpretation placed upon it by the court, nor was there pending *sub judice* a proceeding before the court at the time the letter was written. The conclusion is irresistible that the court exceeded its jurisdiction by an excess of power in adjudging the defendant guilty. The petition for discharge is granted."

"It is ordered that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York, in his office in the Post Office Building, in the Borough of Manhattan, City of New York, and that this order be recorded in said court."

Circuit Judge Hough allowed an appeal. Being of opinion that Circuit Judges, as such, are without power

to grant writs of *habeas corpus*, the Circuit Court of Appeals treated the cause as determined by the District Court, to which Judge Manton had been assigned, and held—"We find no reason why this case is not governed by the general rule that a habeas corpus proceeding cannot be used as a writ or error but must be limited to jurisdictional questions. . . . The sole question which could be considered in the habeas corpus proceedings was as to the jurisdiction of the District Judge. If he had jurisdiction of the person of the petitioner, Craig, and jurisdiction of the subject and authority to render the judgment which he pronounced, there was no right to inquire further in the habeas corpus proceedings, and no right to determine whether or not, in the exercise of that jurisdiction, the District Judge had committed error. If errors were committed, the law afforded a remedy therefor, but not by habeas corpus." It concluded that the District Court, Judge Mayer presiding, had jurisdiction of both offense and person, and reversed the order of discharge.

The court correctly held that United States Circuit Judges, as such, have no power to grant writs of *habeas corpus*.

Two sections of the Revised Statutes authorize the granting and issuing of such writs.

"Sec. 751. The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.

"Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

The Judiciary Act of 1789 provided for the organization of Circuit Courts. Until 1869 they were presided over by District Judges and Justices of the Supreme Court. The Act of April 10, 1869, 16 Stat. 44, created the office

of Circuit Judge. "For each of the nine existing judicial circuits there shall be appointed a circuit judge, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit." This provision became part of—

Sec. 607, Rev. Stats. "For each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court, allotted to the circuit. . . . Every circuit judge shall reside within his circuit."

The Act of March 3, 1911 (Judicial Code, §§ 289, 291, 297), abolished Circuit Courts, conferred their duties and powers upon the District Courts and specifically repealed § 607, Rev. Stats. It also repealed "all Acts and parts of Acts authorizing the appointment of United States circuit or district judges . . . enacted prior to February 1, 1911." Section 118, Judicial Code, provides—

"There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges; in the fourth circuit, two circuit judges; and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. . . . The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided,* That nothing in this section shall be construed to prevent any circuit judge holding district court or serving in the commerce court, or otherwise, as provided for and authorized in other sections of this Act."

Sections 751 and 752, Rev. Stats., give authority to grant writs of *habeas corpus* only to judges and justices of the courts therein specified—Supreme, Circuit, and District. The Judicial Code abolished the Circuit Courts. Only justices of the Supreme Court and judges of District Courts remain within the ambit of the statute.

Section 18, Judicial Code. "Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court."

A duly executed writing designated and appointed Judge Manton " to hold a session of the District Court of the United States for the Southern District of New York for the trial of causes and the hearing and disposition of such ex parte and other business as may come before him during the period beginning February 21, 1921, and ending March 5, 1921." Petitioner's counsel took care to show this assignment and, responding to the motion that the judge should proceed as a District Court in hearing the application for petitioner's discharge, he stated— " Our position is, your Honor, that the writ is issued by you as a Circuit Judge. In addition thereto, you were designated formally under the statute, and under that form of designation you had the power and the duty in chambers of doing the acts and proceedings of a District Court Judge, and we therefore claim that there was super-added to your powers, if necessary, the powers and activities of a District Court Judge." And in the brief here counsel maintains, " In issuing the writ Circuit Judge Manton, in addition to his powers as a Circuit Judge, was exercising the powers of a District Judge under designation."

As Circuit Judges have no authority to issue writs of *habeas corpus,* Judge Manton acted unlawfully unless the proceeding was before him either as District Judge or as the District Court. The record shows he did not rely solely on his authority as Circuit Judge; and, considering his assignment and all the circumstances, we agree with the court below that he was exercising the

powers of the District Court. He was not a District Judge, but Circuit Judge assigned "to hold a session of the District Court."

If it be conceded that he acted as District Judge and not as the District Court, nevertheless his action was subject to review. *Webb* v. *York* (1896), 74 Fed. 753, holds that an appeal lies to the Circuit Court of Appeals from the final orders of a judge at chambers in *habeas corpus* proceedings. Notwithstanding *Hoskins* v. *Funk*, 239 Fed. 278, to the contrary, we approve the conclusion reached in *Webb* v. *York* and think it is supported by sound argument. The court said—

"The present motion to dismiss . . raises the question whether an appeal lies to this court from an order made by a district judge at chambers in a habeas corpus proceeding, directing the discharge of a prisoner. Prior to the act of March 3, 1891, creating circuit courts of appeals . . . an appeal lay from such orders to the circuit court for the district by virtue of section 763, Rev. St. . . . .

"'Sec. 763. From the final decision of any court, justice or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard. . . .'

"In the case of *United States* v. *Fowkes*, 53 Fed. 13, it was held that the act of March 3, 1891, *supra*, operated to divest the circuit courts of their appellate jurisdiction in habeas corpus cases, under section 763, and that by virtue of the provisions of the act of March 3, 1891, the various circuit courts of appeals had acquired the jurisdiction to review the decisions of district courts in habeas corpus cases that had previously been exercised by the circuit courts. This conclusion, we think, was fairly warranted by the following clause. . . .

"'Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any

district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established. . . .'

"See, also *Duff* v. *Carrier,* 55 Fed. 433.

"The result is that, unless the act of March 3, 1891, is construed as lodging in the circuit court of appeals the appellate jurisdiction, under section 763, from final decisions of district judges, that was previously exercised by the circuit courts, the right of appeal, plainly granted by that section, from final decisions of district judges at chambers in habeas corpus cases is lost, and becomes valueless, because no court has been designated to which appeals in such cases may be taken. We think it clear that it was not the purpose of Congress to thus legislate. If it had intended to abolish the right of appeal from the decisions of district judges in habeas corpus cases, it would doubtless have done so in plain and direct terms. The fact that the right of appeal was not thus abolished furnishes a persuasive inference that Congress intended to designate a court to hear and determine such appeals. In *McLish* v. *Roff,* 141 U. S. 661, 666, 12 Sup. Ct. 118, and in *Lau Ow Bew* v. *United States,* 144 U. S. 47, 12 Sup. Ct. 517, it was said, in substance, by the supreme court of the United States that it was the purpose of the act of March 3, 1891, to distribute the entire appellate jurisdiction theretofore exercised by the federal courts between the supreme court of the United States and the circuit courts of appeals that were thereby established. This intent, we think, is plainly apparent from the terms of the act. Moreover, the act in question very much enlarged the right of appeal, and that was one of its chief objects. In no single instance, so far as we are aware,

was a previous right of appeal abolished. We think, therefore, that it may be fairly concluded that it was the intention of Congress to confer on the circuit courts of appeals the right to hear appeals from final orders made by district judges in habeas corpus cases, as well as to hear appeals from final decisions of district courts made in such cases. We can conceive of no reason why the right should be denied in the one case and granted in the other, and such we believe was not the intent of the lawmaker. In the case of *United States* v. *Gee Lee,* 50 Fed. 271, it was held that the words 'the judge of the district court for the district' as used in an act of Congress, were equivalent to the words 'district court for the district.' By a similar latitude of construction, the intent being clear, we think that section 4 of the act of March 3, 1891, may be held to authorize an appeal to the United States circuit court of appeals from a final decision of a district judge at chambers in a habeas corpus case, as well as from a final decision of a district court."

See also *United States, Petitioner* 194 U. S. 194.

Carper v. *Fitzgerald,* 121 U. S. 87; *In re Lennon,* 150 U. S. 393; *McKnight* v. *James,* 155 U. S. 685; *Lambert* v. *Barrett,* 157 U. S. 697; *Harkrader* v. *Wadley,* 172 U. S. 148, are cited by petitioner to show that no appeal lay from the order discharging petitioner. These cases relate to the jurisdiction of this Court, not the Circuit Court of Appeals. The one first cited and most relied upon was decided in 1887. It recognizes the distinction between orders of a judge, as such, and decrees by the court. It denied the right to appeal here from a judge's order; it did not discuss the power of Circuit Courts to review such orders. The later cited cases go no further than to hold that appeals do not lie to this Court from orders by judges at chambers.

Although in point, we cannot agree with *Ex parte Jacobi,* 104 Fed. 681, where the opinion of the Circuit

Judge attempts to support denial of an appeal to the Circuit Court of Appeals from an order granted at chambers.

The court below had jurisdiction of the appeal.

On the merits, there is nothing unusual about the cause now before us. Unlike *Ex parte Hudgings,* 249 U. S. 378, 384, it cannot be regarded as "an exception to the general rules of procedure." Nor do we think it presents circumstances sufficiently extraordinary to bring it within any class of "exceptional cases." *Henry* v. *Henkel,* 235 U. S. 219, 228.

The matter heard by Judge Mayer was an ordinary contempt proceeding and *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, is enough to show that the District Court had power to entertain it, decide whether the evidence established an offense within the statute and determine petitioner's guilt or innocence. When the latter found himself aggrieved by the decree his remedy by appeal was plain. Neglecting that course, he asked a single judge to review and upset the entire proceedings, and now claims there was no appeal from the favorable order. As tersely stated by Judge Hough, "there is no new matter in this record attacking jurisdiction; what really happened was that the case was tried over again, and the so-called writ was no more than a device for obtaining a new trial." The course taken indicates studied purpose to escape review of either proceeding by an appellate court. Petitioner may not complain of unfortunate consequences to himself.

The Circuit Court of Appeals correctly applied the well-established general rule that a writ of *habeas corpus* cannot be utilized for the purpose of proceeding in error. *Harlan* v. *McGourin,* 218 U. S. 442, 445; *Matter of Gregory,* 219 U. S. 210, 213, 217; *Glasgow* v. *Moyer,* 225 U. S. 420, 428, 429. Its decree is affirmed and the cause will be remanded to the District Court for the Southern District of New York with directions to vacate the order

releasing petitioner; discharge the writ; and take such further proceedings as may be necessary to carry this opinion into effect.

Affirmed.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this cause.

MR. CHIEF JUSTICE TAFT, concurring.

I concur fully in the opinion of the Court.

It is of primary importance that the right freely to comment on and criticise the action, opinions and judgments of courts and judges should be preserved inviolate; but it is also essential that courts and judges should not be impeded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgments, or of impairing the justice and impartiality of verdicts.

If the publication criticises the judge or court after the matter with which the criticism has to do has been finally adjudicated and the proceedings are ended so that the carrying out of the court's judgment can not be thereby obstructed, the publication is not contempt and can not be summarily punished by the court however false, malicious or unjust it may be. The remedy of the judge as an individual is by action or prosecution for libel. If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in the carrying out of its orders and judgment, the court may, and it is its duty to protect the administration of justice by punishment of the offender for contempt.

The federal statute concerning contempts as construed by this Court in prior cases vests in the trial judge the jurisdiction to decide whether a publication is obstructive

or defamatory only. The delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest. But the law gives the person convicted of contempt in such a case the right to have the whole question on facts and law reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceedings, and if not successful in that court, to apply to this Court for an opportunity for a similar review here.

The petitioner and his counsel have made such a review impossible. Instead of pursuing this plain remedy for injustice that may have been done by the trial judge and securing by an appellate court a review of this very serious question on the merits, they sought by applying to a single judge of only coördinate authority for a writ of *habeas corpus* to release the petitioner on the ground that the trial judge was without jurisdiction to make the decision he did. This raised the sole issue whether the trial judge had authority to decide the question, not whether he had rightly decided it.

Relying on a decision of this Court made years ago when the statutory provisions were different from those which now apply, the petitioner and his counsel thought that if they could secure a decision from a single circuit judge releasing the petitioner, no appeal would lie from his decision and that thus resort to the appellate courts could be avoided. The single judge to whom they applied released the prisoner. They were, however, mistaken in supposing that no appeal lay from the judge's decision on the question of the trial court's jurisdiction. The Government prosecuted its appeal and the only issue presented in that review is the matter of the trial court's jurisdiction which the Circuit Court of Appeals and we uphold. In this way, the petitioner and his counsel threw

away opportunity for a review of the case on its merits in the Circuit Court of Appeals and in this Court in their purpose to make a short cut and secure final release through the act of a single judge. This is the situation the petitioner finds himself in and we are without power to relieve him.

MR. JUSTICE HOLMES, dissenting.

I think that the petitioner's resort to *habeas corpus* in this case was right and was the only proper course. Very possibly some of the cases confuse the principles that govern jurisdiction with those that govern merits. See *Fauntleroy* v. *Lum,* 210 U. S. 230, 235. But I think that this should be treated as a question of jurisdiction. The statute puts it as a matter of power, "The said courts shall have power . . . to punish . . . contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," etc. Jud. Code, § 268. I think that these words should be taken literally and that we do not need a better illustration of the need to treat them as jurisdictional and to confine the jurisdiction very narrowly than the present case. For we must not confound the power to punish this kind of contempts with the power to overcome and punish disobedience to or defiance of the orders of a court, although unfortunately both are called by the same name. That of course a court may and should use as fully as needed, but this, especially if it is to be extended by decisions to which I cannot agree, makes a man judge in matters in which he is likely to have keen personal interest and feeling although neither self-protection nor the duty of going on with the work requires him to take such a part. It seems to me that the statute on its face plainly limits the jurisdiction of the judge in this class of cases to those

where his personal action is necessary in a strict sense in order to enable him to go on with his work. But wherever the line may be drawn it is a jurisdictional line. "The jurisdiction attaches only when the suit presents a substantial claim under an act of Congress." *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Co.*, 252 U. S. 436, 441. *Ex parte Hudgings*, 249 U. S. 378.

I think that the sentence from which the petitioner seeks relief was more than an abuse of power. I think it should be held wholly void. I think in the first place that there was no matter pending before the Court in the sense that it must be to make this kind of contempt possible. It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published. The English cases show that the law of England at least is in accord with my view. *Metzler* v. *Gounod*, 30 Law Times R., N. S., 264. But if there had been, and giving the most unfavorable interpretation to all that the letter says, I do not see how to misstate past matters of fact of the sort charged here could be said to obstruct the administration of justice. Suppose the petitioner falsely and unjustly charged the judge with having excluded him from knowledge of the facts, how can it be pretended that the charge obstructed the administration of justice when the judge seemingly was willing to condone it if the petitioner would retract? Unless a judge while sitting can lay hold of any one who ventures to publish anything that tends to make him unpopular or to belittle him I cannot see what power Judge Mayer had to touch Mr. Craig. Even if feeling was tense there is no such thing as what Keating, J., in *Metzler* v. *Gounod* calls contingent contempt. A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some

later date, any more than he can for exciting public feeling against a judge for what he already has done.

MR. JUSTICE BRANDEIS concurs in this opinion.

SECURITY SAVINGS BANK *v.* STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 21. Submitted October 3, 1923.—Decided November 19, 1923.

1. Savings deposits, in a state banking corporation having its place of business within the State of its creation, are intangible property subject, like tangible property, to the dominion of the State. P. 285.
2. A state law requiring a bank, through appropriate procedure, to pay over such deposits, when long unclaimed, to the State as depositary or by way of escheat, violates no right of the bank under the contract clause of the Constitution or the due process clause of the Fourteenth Amendment, since the bank's contracts with the depositors merely give it the use of the money until called for by proper authority, and payment to the State in obedience to a valid law discharges its obligation to them. *Id.*
3. The two essentials of jurisdiction in a proceeding by the State to effect an escheat of such unclaimed deposits, in order that the depositors may be bound and the bank protected, are seizure of the *res* at the beginning of the suit and reasonable notice and opportunity to be heard accorded the depositors. P. 287.
4. Under the California statutes here involved, seizure of the *res* is accomplished by personal service on the bank, in a suit brought by the Attorney General in Sacramento County, and due notice is given the depositors by publication in that county of a summons, with a notice, also, to all other persons to appear and show cause why the money should not be deposited with the State Treasurer. *Id.*
5. Proof by affidavit that personal service on depositors is impossible or impracticable is not a constitutional prerequisite to service by publication in such an escheat proceeding, where the depositors impleaded are only those who are not known to the bank officials to be alive, whose accounts have not been added to or drawn

upon for twenty years, and who have not filed with the bank, within that time, any notice or claim giving their then residences. P. 288.

6. In view of other statutes requiring savings banks in California to publish at their several locations annual notices of deposits not added to or drawn upon during the preceding ten years, with the name, last known residence and other particulars concerning the depositor, this Court cannot say that the escheat statute, in providing for publication of summons in escheat proceedings at Sacramento County only, was unreasonable. P. 289.

186 Cal. 419, affirmed.

ERROR to a judgment of the Supreme Court of California affirming a judgment of escheat of bank deposits in suit of the State against the Savings Bank and the depositors.

Mr. Edward J. McCutchen, Mr. Warren Olney, Jr., and *Mr. A. Crawford Greene* for plaintiff in error.

Mr. U. S. Webb, Attorney General of the State of California, for defendant in error. *Mr. Frank L. Guerena*, Deputy Attorney General, was also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought by the State of California to have transferred to it certain deposits in the Security Savings Bank which had been unclaimed for more than twenty years; and to have these declared escheat. The bank and the depositors were named as defendants. The bank was served personally and defended. The depositors were served by publication; but none of them appeared.[1] The

[1] As to two depositors originally named as defendants a dismissal was entered by stipulation. As to one, because it appeared that the deposit had not been unclaimed for the twenty years; as to the other, because a claim had been made by the administrator, since the expiration of the twenty years.

bank is a California corporation and has its only place of business there. The last known residences of the depositors are not stated. All the proceedings were in conformity with § 1273 of the California Code of Civil Procedure and § 15 of its Bank Act, Stat. 1915, c. 608, p. 1106. A judgment for the plaintiff was affirmed by the highest court of the State. *State* v. *Security Savings Bank,* 186 Cal. 419. The case is here on writ of error under § 237 of the Judicial Code as amended. The question for decision is whether the statutes violate rights guaranteed a state bank by the Federal Constitution.[2] It is claimed that they are obnoxious to both the contract clause and the due process clause.

The substantive provision of the legislation is this: If a bank account has not been added to or drawn upon by the depositor for more than twenty years; and no one claiming the money has, within that period, filed with the bank any notice showing his present residence; and the president or managing officer of the bank does not know that the depositor is alive; then the bank shall, upon entry of a judgment establishing these facts, deposit with the state treasurer the amount of the deposit and accumulations. The suit cannot be begun until after the expiration of the twenty years. The statute does not effect an immediate escheat upon the lapse of the twenty years. It provides for taking over the deposit when so adjudged in the action. A valid claim to a deposit duly made at any time prior to entry of the judgment prevents its transfer to the State. *Mathews* v. *Savings Union Bank & Trust Co.,* 43 Cal. App. 45, 48. *State* v. *Savings Union Bank & Trust Co.,* 186 Cal. 294, 298.

The procedural provision is this: The suit is brought by the attorney general in Sacramento County. Upon the bank, personal service must be made. Upon the depos-

[2] That the statutes are invalid as applied to national banks was settled in *First National Bank* v. *California,* 262 U. S. 366.

itors, service is to be made by publication of the summons for four weeks in a newspaper of general circulation published in that county. With the summons a notice must also be published requiring all persons other than the named defendants, to appear and show cause why the moneys involved in the suit shall not be deposited with the state treasurer. Any person interested may become a party to the suit. The judgment to be entered requires the "banks to forthwith deposit all such moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property." For a period of five years after entry of the judgment any person not a "party or privy" to it may sue the State to recover the money so received. In the case of infants and persons of unsound mind, the period is extended for one year after removal of the disability. Code of Civil Procedure, § 1272.

The unclaimed deposits are debts due by a California corporation with its place of business there. *State* v. *Anglo & London Paris National Bank,* 186 Cal. 746, 753; *State* v. *Security Savings Bank,* 186 Cal. 419, 423. The debts arose out of contracts made and to be performed there. *Farmers & Merchants Bank* v. *Federal Reserve Bank,* 262 U. S. 649, 660. Thus the deposits are clearly intangible property within the State.[3] Over this intangible property the State has the same dominion that it has over tangible property. *Pennington* v. *Fourth National Bank,* 243 U. S. 269; *Bank of Jasper* v. *First National Bank,* 258 U. S. 112, 119. It was settled in *Provident Institution for Savings* v. *Malone,* 221 U. S. 660, that, where the procedure is appropriate, neither the due process clause, nor any right of the bank under the contract clause, is violated by a law requiring it to pay over to the

[3] See Charles E. Carpenter, "Jurisdiction over Debts, etc.," 31 Harv. Law Rev. 905.

State as depositary savings deposits which have long remained unclaimed. Compare *Cunnius* v. *Reading School District,* 198 U. S. 458; *Blinn* v. *Nelson,* 222 U. S. 1. The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized. If the deposit is turned over to the State in obedience to a valid law, the obligation of the bank to the depositor is discharged. *Louisville & Nashville R. R. Co.* v. *Deer,* 200 U. S. 176. It is no concern of the bank's whether the State receives the money merely as depositary or takes it as an escheat.

The bank's main contention is that it is denied due process because, owing to defects in the prescribed procedure, depositors will not be bound by the judgment; and, hence, that payment to the State will not discharge the bank from its liability to them. The argument that there is no proper provision for service upon depositors or other claimants is this: If the proceeding is *in personam,* the law is invalid as to non-residents of the State, since they are served only by publication; and it is invalid as to residents, because they are served by publication without a prior showing of the necessity for such service. If the proceeding is *quasi in rem,* the law is invalid as to all depositors and claimants, because there is no seizure of the *res,* or its equivalent; because the notice provided for is inadequate and unreasonable; and because it is binding only on parties to the action. If the proceeding is strictly *in rem* the law is invalid, because it does not provide for such seizure of the *res,* nor give reasonable notice to depositors and claimants.

The proceeding is not one *in personam*—at least, not so far as concerns the depositor. The State does not seek to enforce any claim against him. It seeks to have the deposit transferred. The suit determines the custody

(and perhaps the ownership) of the deposit. The state court likened the proceeding to garnishment, and thought that it should be described as *quasi in rem*. In form it resembles garnishment. In substance it is like proceedings in escheat, *Hamilton* v. *Brown*, 161 U. S. 256, 263; *Christianson* v. *King County*, 239 U. S. 356, 373; for confiscation, *The Confiscation Cases*, 20 Wall. 92, 104; for forfeiture, *Friedenstein* v. *United States*, 125 U. S. 224, 230, 231; for condemnation, *Huling* v. *Kaw Valley Ry., etc., Co.*; 130 U. S. 559; for registry of titles, *American Land Co.* v. *Zeiss*, 219 U. S. 47; and libels for possession brought by the Alien Property Custodian, *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554. These are generally considered proceedings strictly *in rem*. But whether the proceeding should be described as being *in rem* or as being *quasi in rem* is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and reasonable notice and opportunity to be heard. Compare *Pennoyer* v. *Neff*, 95 U. S. 714, 724; *Freeman* v. *Alderson*, 119 U. S. 185, 187; *Arndt* v. *Griggs*, 134 U. S. 316; *Overby* v. *Gordon*, 177 U. S. 214, 231. These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent. And the published summons to the depositors named as parties defendant is supplemented by the notice directed to all claimants whomsoever. Moreover, there is no constitutional objection to considering the proceeding as *in personam*, so far as concerns the bank; as *quasi in rem*, so far as concerns the depositors; and as strictly *in rem*, so far as concerns other claimants.[4]

Seizure of the deposit is effected by the personal service made upon the bank. *Provident Institution for Savings* v. *Malone*, 221 U. S. 660. Thereby the *res* is subjected

[4] Compare *Newell* v. *Norton*, 3 Wall. 257; *The Sabine*, 101 U. S. 384; Waples, Proceedings in Rem (1882), pp. 758–768.

to the jurisdiction of the court. Compare *Miller* v. *United States,* 11 Wall. 268, 297, 298; *Alexandria* v. *Fairfax,* 95 U. S. 774, 779. The service upon the bank has the same effect as had service of the injunction in *Pennington* v. *Fourth National Bank,* 243 U. S. 269; or the service upon the garnishee in *Harris* v. *Balk,* 198 U. S. 215, 223; or the application for administration of the debt due an absentee in *Cunnius* v. *Reading School District,* 198 U. S. 458; or the levy of the writ and return of the fact to the court on attachment of the real estate in *Cooper* v. *Reynolds,* 10 Wall. 308. The fact that the claim of the State to the deposit may be defeated by the appearance of the debtor or other claimant does not, as argued, prove that the deposit was not seized. An attachment of real estate is a seizure, although it may be dissolved by bankruptcy or otherwise.

The statutory service is reasonable; and the court is required to hear any one who may appear in the suit. The objections urged to the notice are not that insufficient time is allowed for entering an appearance, as in *Roller* v. *Holly,* 176 U. S. 398, and *Goodrich* v. *Ferris,* 214 U. S. 71, or that the contents of the notice fail to convey the required information, as in *Grannis* v. *Ordean,* 234 U. S. 385. The objections taken are to the order and the place of publication. It is urged that the notice is insufficient, because service may not be made by publication until it has been shown by affidavit that personal service is impossible or impractical. Such an affidavit is a common requirement in statutes providing for service by publication on absent defendants. Compare *Romig* v. *Gillett,* 187 U. S. 111; *Jacob* v. *Roberts,* 223 U. S. 261. But it is not constitutionally indispensable. The reason for requiring the affidavit is that ordinarily, personal service would be more likely to acquaint a defendant with the pendency of the suit. But here the general facts which underlie the legislation establish the futility of such a re-

quirement. It may be that in California banks usually endeavor to ascertain the whereabouts of depositors whose accounts have remained dormant for many years. The statute applies only to deposits in the name of a person who is not known to the president or managing officer of the bank to be alive, whose account has not been added to or drawn upon for twenty years, and who has not filed within that time any notice or claim giving his then residence. The legislature evidently assumed that it would be impossible to serve such depositors personally. The Supreme Court of the State held that the legislature was warranted in this assumption. The owners of the deposits were, therefore, treated like persons unknown. Compare *Leigh* v. *Green*, 193 U. S. 79. We cannot say that the view entertained by the legislature and the state courts was so unreasonable as to constitute a denial of due process.

It is further argued that the publication prescribed is not reasonable notice, because it is made in Sacramento County, instead of in the county in which the bank is located. The legislature apparently assumed that publication in Sacramento County would be more likely to attract the attention of the depositor, or of those claiming under him, than publication in the city in which the bank was located. Support for that opinion may be found in the statutes which have required savings banks (and later all banks) to publish annually in a newspaper of the city in which it is located a statement showing the amount of each deposit therein, the name and last known residence of each depositor, and the fact of his death, if known, in all cases where the depositor has not made a deposit or withdrawal for ten years next preceding, unless the depositor is known to be living or the deposit is less than fifty dollars. Stats. 1893, p. 183; Stats. 1897, p. 27. Civil Code, § 583b. Such annual publica-

tions, if seen, would be apt to remind a depositor of his account, even if he were not named therein. And if he had died, it might serve as a reminder, or as a suggestion, to his next of kin. The fact that, after nine, or more, such publications in the local newspaper, a deposit remains unclaimed, affords the legislature some basis for thinking that the further publication provided for in these proceedings would be more apt to accomplish the purpose of actual service, if made in the county in which the state capital is located. The highest court of the State deemed the prescribed publication in Sacramento County reasonable notice. We have no ground for saying that it was not. Obviously the question "is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts" or abused its discretion. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Adams* v. *Milwaukee,* 228 U. S. 572, 583.

In the opinion below it was suggested that the statute may be construed as permitting a depositor, although named as defendant in the attorney general's suit, to make claim as against the State, under § 1272, at any time within the five years (or the extended period) after final judgment, if he did not appear in the suit. As no depositor had appeared, the point was not passed upon; and the state court expressly left open the rights of depositors and their privies in respect to escheat. *State* v. *Security Savings Bank,* 186 Cal. 419, 431. We have no occasion to consider them.

Affirmed.

BINDERUP *v.* PATHE EXCHANGE, INCORPORATED, ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 77. Argued October 16, 1923.—Decided November 19, 1923.

1. Where jurisdiction of the District Court depends on the action arising under a law of the United States, and the court sustains a motion by the defense for a directed verdict based on the ground that the plaintiff's petition and opening statement fail to state facts sufficient to constitute a cause of action within the federal statute which the plaintiff relies on, the case is not reviewable directly by this Court under Jud. Code, § 238, as one in which the jurisdiction of the District Court was in issue. P. 304.
2. So *held*, where the trial judge, in a memorandum accompanying the ruling, indicated his opinion that the motion went to the jurisdiction, erroneously assuming that failure to allege facts sufficient to constitute a cause of action under a federal statute is a jurisdictional defect. P. 305.
3. A complaint setting forth a substantial, as distinguished from a frivolous, claim under a federal statute presents a case within the jurisdiction of the District Court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. P. 305.
4. New York manufacturers and distributors of motion-picture films, in the regular course of their business, shipped films from that State to Nebraska and delivered them there to a Nebraska resident, as lessee under agreements, which by their terms were to be deemed and construed as New York contracts, and which licensed and obliged the lessee to exhibit the pictures, for specified periods, in moving-picture theatres, reserved rentals to the lessors and provided for ultimate reshipment by the lessee on advices to be given by them. *Held*, that the business of the lessors, and their transactions with the lessee, were interstate commerce, notwithstanding that, in accordance with the contracts, the films were delivered to him through agencies of the lessors in Nebraska to which they were first consigned and transported. P. 309.

5. It does not follow that because a thing is subject to state taxation it is also immune to federal regulation under the commerce clause. P. 311.
6. A combination and conspiracy of concerns controlling the distribution of motion-picture films, to put out of business an exhibitor of motion pictures who has been procuring his films through agreements made in interstate commerce with members of the combination and can procure them in no other way, and to accomplish this end by illegally canceling his existing contracts and by refusing to deal with him in the future, is a restraint on interstate commerce in violation of the Anti-Trust Act. P. 311.

280 Fed. 301, reversed.

ERROR to a judgment of the Circuit Court of Appeals affirming, for want of jurisdiction in the District Court, a judgment of the latter which dismissed, upon a directed verdict, an action for damages under § 7 of the Sherman Act.

Mr. Dana B. Van Dusen, with whom *Mr. C. P. Anderberry, Mr. Norris Brown* and *Mr. Irving F. Baxter* were on the brief, for plaintiff in error.

The court below overlooked the following allegations of the complaint: That the usual course of business was for the contracts to be made in New York prior to the time the films left the New York factories; that after the films reached the Omaha agents, they continued to move from exhibitor to exhibitor throughout a zone of four States, and that, since plaintiff was only one of a number of exhibitors in that zone using the same film, it was constantly crossing state lines and might equally as well come to him from another State as from within the State of Nebraska; that the refusal of defendants to supply plaintiff with films applied to all films to be manufactured and shipped in the future from New York to the Omaha agents; and that the rule which prevented plaintiff from leasing films direct from New York or from any other zone office of the defendants, combined with the concerted refusal of all business dealings at Omaha, deprived plaintiff of opportunity to purchase films anywhere in the United States.

Wagner v. *Covington,* 251 U. S. 95; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500; *General Oil Co.* v. *Crain,* 209 U. S. 211; and *Bacon* v. *Illinois,* 227 U. S. 505, relied upon by the court below, involved the constitutionality of state taxation, and are based upon facts dissimilar to the facts in the case at bar. In those cases, the articles of trade were always already inside the State of the purchaser when the contract of sale was made. The dissenting opinion below recognizes the similarity between this case and *Swift & Co.* v. *United States,* 196 U. S. 375.

Decisions with regard to state taxation are inapplicable to the determination of questions arising under the Sherman Act. *Stafford* v. *Wallace,* 258 U. S. 495; *Addyston Pipe Co.* v. *United States,* 175 U. S. 211; *Butler Bros.* v. *U. S. Rubber Co.,* 156 Fed. 1; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290.

Films moving from New York to plaintiff through the hands of Omaha agents pursuant to contracts previously entered into, move in interstate commerce. *Caldwell* v. *North Carolina,* 187 U. S. 622.

Films moving to plaintiff from points in other States within the Omaha zone, whether moving directly to plaintiff or through the hands of the Omaha agents, move in interstate commerce.

Even that part of the films which were already in the State prior to the execution of the contracts between plaintiff and the defendants still remained in interstate commerce. Films are sent to Omaha for purposes of sale or lease. The local exchange is merely the solicitor of orders upon behalf of its New York principal. It does not have the power to enter into contract. Solicitation and delivery alone take place within the State. The subsequent movements from hand to hand throughout

the zone are controlled by the nonresident principal, who at no time surrenders ownership or control over the film.

The films are not "at rest" upon arrival at Omaha. See *Western Union Tel. Co.* v. *Foster,* 247 U. S. 105; *Western Oil Co.* v. *Lipscomb,* 244 U. S. 346; *Champlain Co.* v. *Brattleboro,* 260 U. S. 366.

To separate the shipment from New York to Omaha from the movement from Omaha to the Nebraska exhibitor, is to look solely to the matter of transportation. Mere transportation, however, does not constitute trade and therefore does not constitute commerce, as it must be understood in a discussion of the Sherman Act. Sales by branch agencies of packers to purchasers within the same State constitute interstate commerce under that act. *Swift & Co.* v. *United States,* 196 U. S. 375. See also, s. c. 122 Fed. 529; and *Stafford* v. *Wallace,* 258 U. S. 495. This case is stronger than the *Swift Case,* because here the contracts were with the New York principals rather than the local agents. The importance of the approval of these contracts in another State was emphasized in *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290.

If the industry be nation-wide in scope and the principals to the contract reside in different States, the application of the Sherman Act cannot be destroyed by the forms or technicalities of the original package doctrine.

Even apart from prior contract, a distributing agency is not a final destination but a mere facility. Each picture is an unique article and may itself be considered the original package.

The dealings between the Omaha agencies and plaintiff in the same State are not purely local matters. *Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501; *Butler Bros.* v. *U. S. Rubber Co.,* 156 Fed. 1; *United States* v. *Jellicoe Coal Co.,* 46 Fed. 432; *Gibbs* v. *McNeely,* 119 Fed. 120.

It is unnecessary to establish that the films at Omaha

remained in interstate commerce, since the conspiracy complained of had a direct effect upon the interstate commerce of bringing films from New York to Omaha, by rendering it impossible in the future to bring films from New York for use by plaintiff in Nebraska, thus narrowing the market for the sale of films by foreign manufacturers within Nebraska. *Montague & Co.* v. *Lowry,* 193 U. S. 38; and other cases.

It is immaterial whether the interstate commerce which is affected takes place prior or subsequent to the intrastate sale. *Montague & Co.* v. *Lowry, supra; United States* v. *Reading Co.,* 226 U. S. 324; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 410; *Knauer* v. *United States,* 237 Fed. 8; *Council of Defense* v. *International Magazine Co.,* 267 Fed. 390.

Mr. William Marston Seabury and *Mr. Arthur F. Mullen,* with whom *Mr. Charles B. Samuels, Mr. Elek John Ludvigh, Mr. S. F. Jacobs, Mr. Saul E. Rogers, Mr. Karl W. Kirchwey, Mr. Gabriel Hess, Mr. Siegfried F. Hartman, Mr. Oscar M. Bate, Mr. J. Robert Rubin, Mr. John J. Sullivan* and *Mr. Eugene N. Blazer* were on the brief, for defendants in error.

I. The judgment of the District Court was reviewable only under Jud. Code, § 238. *United States* v. *Jahn,* 155 U. S. 109; *Boston & Maine R. R.* v. *Gokey,* 210 U. S. 155; *Wilson* v. *Republic Iron Co.,* 257 U. S. 92.

In the case at bar, where the decision of the District Court denied its own jurisdiction, it is clear that even if the District Court, after deciding that it was without power to proceed, had assumed to determine other questions incidental to the merits of the controversy described in the complaint, this Court alone would have had jurisdiction to review the case, because when a court holds that it is without power to proceed it is unable thereafter to determine any other issue involved in the controversy.

True, the judgment of the District Court does not specify the grounds of dismissal, but its opinion, to which reference may be made for the purpose of ascertaining the grounds of the decision (*Loeb* v. *Columbia Township Trustees*, 179 U. S. 472), clearly states them.

Where, as here, the cause is cognizable exclusively by a federal court, in which federal jurisdiction is invoked solely upon the ground that the cause is one arising under a federal statute, and dismissal results from the failure of the petition in a fundamental respect to state facts sufficient to constitute such a cause of action, that judgment of dismissal denies the existence of jurisdiction in the District Court as a federal tribunal and presents a strictly jurisdictional issue which is reviewable exclusively in this Court under Jud. Code, § 238. *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U. S. 436; *The Steamship Jefferson*, 215 U. S. 130; *The Ira M. Hedges*, 218 U. S. 264; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Weber* v. *Freed*, 239 U. S. 325; *The Pesaro*, 255 U. S. 216; *The Carlo Poma*, 255 U. S. 219. *Hart* v. *Keith Exchange*, 262 U. S. 271, distinguished.

II. This Court has no jurisdiction to review the judgment of the District Court except as prescribed in Jud. Code, § 238. *Seney* v. *Swift & Co.*, 260 U. S. 146; *Union & Planters Bank* v. *Memphis*, 189 U. S. 71; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561; *Four Hundred and Forty-three Cans of Egg Product* v. *United States*, 226 U. S. 172; *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305; *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219; *The Carlo Poma*, 255 U. S. 219.

The Act of September 14, 1922, amending Jud. Code, § 238, known as § 238a, has no application to the case at bar. It was passed too late to be of service to the plaintiff in error, and it clearly does not mean that, after the wrong court has gone to judgment on a case, it may then be shunted into another court for further consideration and review.

III. The facts stated in the complaint describe transactions which as a matter of law were local and not interstate and hence the allegations were insufficient in a jurisdictional respect to constitute a cause of action.

The individual branch managers of the several corporate defendants were citizens of Nebraska, and they were not alleged to be engaged in interstate commerce. The corporate defendants are in most instances foreign corporations which are engaged generally in interstate commerce. But the transactions described in the petition did not relate to interstate commerce. They concerned local persons and local things only.

It appears that, pursuant to the established custom of the trade, the defendants send a specified quantity of films to their several exchanges at Omaha, and after the films reach the exchanges they are unpacked and stored at the local offices of the defendants until they begin to rotate among the exhibitors of Nebraska, incidentally going into Iowa and South Dakota, but having their situs at the Omaha exchange, where they become and remain a part of the general property in Nebraska during their entire commercial life. When a Nebraska exhibitor wishes to rent a film from any of the defendants, he rents it from the Omaha exchange, and no interstate transaction or movement of the film is involved.

The plaintiff asserted that the defendants controlled the distribution of the entire production of films in the United States, and that no films could be procured from any other source that could be used in plaintiff's theatres, and that no films had ever been produced in the State of Nebraska. Notwithstanding this sweeping assertion, if the films of the defendants were at rest in their local exchanges when the plaintiff endeavored to rent them, interstate commerce would not be affected by a refusal of the defendants' agents in Omaha to deliver to the plaintiff in Nebraska.

The plaintiff does not allege that films were sent to him directly from beyond the State by the defendants. On the contrary, he says that they were procured by the defendants from beyond the State and were forwarded to him by express and parcels post. This means that the defendants' agents forwarded the films from the Omaha exchanges to the plaintiff in Nebraska by express and parcels post.

It is alleged that in leasing films from their New York offices defendants "through their branch offices in Omaha" entered into written and oral contracts with the plaintiff on the terms described in the written contracts attached to the petition, and that thereunder the title, control and right to recall the films was at all times retained by the home offices at New York.

The essential thing which appears from these exhibits is that deliveries of the films were made by the defendants to the plaintiff and redeliveries from plaintiff to the defendants entirely at the Omaha branch offices, again conclusively indicating the local character of the transactions.

Even the conspiracy charged was to ruin the plaintiff's business, and, as we have said, the plaintiff's business was purely local.

When the films reached the exchanges in Omaha they were at rest and ceased to be in interstate commerce, and any agreement, combination or conspiracy by which their subsequent movements in Nebraska were restricted would not constitute interstate trade or commerce. *Mutual Film Corporation* v. *Ohio Industrial Comm.*, 236 U. S. 230. *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, distinguished.

This is not a case "where orders are taken in one State for goods to be supplied from another State, which orders are transmitted to the latter State for acceptance or rejection and filled from stock in that State," which would

constitute interstate commerce. *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304; *Crenshaw* v. *Arkansas,* 227 U. S. 389; *Brennan* v. *Titusville,* 153 U. S. 289; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Dozier* v. *Alabama,* 218 U. S. 124; *Western Oil Co.* v. *Lipscomb,* 244 U. S. 346.

We are within the principle of the cases which hold that property brought from another State and withdrawn from the carrier and held by the owner with full disposition becomes subject to the local taxing power notwithstanding the owner may intend actually to forward it to a destination beyond the State. *Bacon* v. *Illinois,* 227 U. S. 504; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500; *Kelley* v. *Rhoads,* 188 U. S. 1; *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82; *Woodruff* v. *Parham,* 8 Wall. 123; *Brown* v. *Houston,* 114 U. S. 622; *Coe* v. *Errol,* 116 U. S. 517; *Pittsburgh & Southern Coal Co.* v. *Bates,* 156 U. S. 577; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Browning* v. *Waycross,* 233 U. S. 16; *Southern Pacific Co.* v. *Arizona,* 249 U. S. 472.

Nor are the films plunged again into interstate commerce by the fact that the ultimate approval of the local contracts may in most instances rest with the home office of the defendant companies situated beyond the State, or by the fact that when the films reach the Omaha exchanges the defendants intend that they may be sent into Iowa or South Dakota, as the authorities cited show.

The point is that, even though the Nebraska films might be subject to control by the home offices of the defendants, nevertheless that control, even when exerted, did not result in movements or shipments of the films resting in Omaha, in interstate commerce.

There is a complete absence of allegation to indicate that there was or could have been any combination or conspiracy to restrain interstate commerce.

There is nothing but the reiteration of the baseless contention that the defendants combined and conspired to

put the plaintiff out of business. *Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501, distinguished.

IV. The complaint failed in other respects to state facts sufficient to constitute a cause of action under the Sherman Act or any other of the anti-trust statutes.

In a case such as this every essential element of the court's jurisdiction must not only affirmatively appear, but it must appear with substantial certainty and without doubt or ambiguity. *Blumenstock Bros.* v. *Curtis Pub. Co.,* 252 U. S. 436.

Here, the statements of plaintiff's counsel affirmatively disclosed a case which did not affect or relate to a restraint of trade or a monopoly of any part of interstate commerce, and hence there was and is no cause of action. *Oscanyan* v. *Arms Co.,* 103 U. S. 261.

The statement of plaintiff's counsel was in substantial accord with the allegations of the petition, which were deficient.

Many authorities sustain the legality of trade association activities involving conduct much more serious than anything alleged against the defendants.

The plaintiff has endeavored to allege a conspiracy among the defendants to restrain interstate trade and commerce in motion picture films as a result of which plaintiff was injured. But an entirely different state of facts is actually set forth. The only purpose and object of the conspiracy which may be said to be well pleaded is the charge that defendants conspired to ruin the plaintiff's business and not to restrain interstate trade or commerce.

True, the expression, "In restraint of trade and commerce among the several States" is used, but these expressions are mere conclusions of law. *Witherill & Dobbins Co.* v. *United Shoe Mfg. Co.,* 267 Fed. 950.

Although by itself the charge that the defendants conspired to ruin the plaintiff's business might constitute an

illegal purpose, yet, when stated in conjunction with facts which show that this was not the purpose of the alleged concerted action of the defendants, it becomes clear that, even if ruination of the plaintiff's business resulted from the acts of the defendants in the protection of their own business, if these acts were lawful, that result was a mere incident of a lawful purpose, executed by lawful means and gave rise to no cause of action against the defendants. *American Steel Co.* v. *American Steel & Wire Co.*, 244 Fed. 300.

Moreover, since it appears that, even if everything alleged in the petition were true, no purpose or object unreasonably and directly to restrain interstate commerce has been shown, the means by which the supposed conspiracy is alleged to have been attained must not only be illegal, but they must directly and unreasonably restrain interstate trade and commerce, otherwise there is no cause of action.

The means used to effect what in reality was the lawful object of the defendants, namely, the protection and preservation of their own business, which plaintiff prefers to describe as a conspiracy to ruin his business, are each and all of them lawful.

Mr. Justice Sutherland delivered the opinion of the Court.

This action was brought under the provisions of § 7 of the Act of Congress of July 2, 1890, commonly called the Anti-Trust Act, c. 647, 26 Stat. 210. The complaint is long, but the allegations necessary to be considered here may be summarized as follows:

Plaintiff in error, a resident of the State of Nebraska, hereafter called the "exhibitor," owned a moving picture theater at Minden, in that State, and operated as lessee theaters in other places, to all of which, including his own, he supplied moving picture films and advertis-

ing matter connected therewith. In addition, he was in the business of selecting and distributing to a circuit of moving picture theaters, films and advertising matter accompanying them, under agreements with the various operators, some twenty or more in number, in various parts of the State.

The corporations named as defendants in error, hereafter called the "distributors," were located in the State of New York, and were there engaged in manufacturing motion picture films and distributing them throughout the United States. The method of distribution was to make public announcement from time to time that films, which had been manufactured and approved, would be released, and thereupon send them from New York, by express or parcel post, to agencies in numerous cities for delivery to exhibitors who hired and paid for their use.

Some of these distributors entered into contracts with the exhibitor, by the terms of which they leased motion pictures to him with the right and license to display them publicly at the theater or theaters named. The individual defendants named were managers of branch offices or agencies for the various distributors at Omaha, Nebraska, through which films were distributed to exhibitors in the States of Iowa, Nebraska, South Dakota and Minnesota. These contracts by their terms were deemed made in New York, were to be construed according to the laws of that State, and provided that deliveries should be made to the exhibitor through the Omaha branch offices. The exhibitor, upon his part, agreed to accept and publicly exhibit the motion pictures for the periods of time fixed, for which right he was to pay specified sums. When the use of the pictures was completed according to the contract, they were to be re-shipped on advices given by the distributors.

The complaint further alleges that these distributors control the distribution of all films in the United States

and that the films cannot be procured from others. The Omaha Film Board of Trade is a Nebraska corporation, organized for the purpose of promoting good will among those engaged in the motion picture business and for other purposes, its membership being limited to one representative from each company or person engaged in the film business. It is alleged that the exhibitor's business was successful and profitable and that, the cupidity of the distributors being thereby aroused, some of them requested a share of his patronage, and, upon his refusal, made threats to put him out of business by underbidding and supplying the various theaters constituting his circuit; that the Omaha Film Board of Trade was organized for the purpose of enabling these distributors to control prices and dictate terms to their patrons in Nebraska and other States. It is further alleged that the business of the exhibitor had grown to large proportions; that he was procuring films from some of the members of the Omaha Film Board of Trade, but had refused to buy from others, and that thereby a spirit of hostility was aroused against him on the part of the latter who thereupon brought great pressure to induce those with whom he was dealing to cease doing business with him; that all the defendants in error thereupon unlawfully combined and conspired in restraint of trade and commerce among the several States, with the purpose and intent of preventing him from carrying on his said business and with the intent to ruin him; that they caused false charges to be made against him before the Film Board of Trade, and, without his knowledge or an opportunity to be heard, placed him upon its blacklist, of which notice was given to distributors who thereupon refused to transact further business with him; that those distributors who were not members of the Film Board of Trade coöperated with and approved the action of the Board and conspired with the others to ruin the business, credit and reputation of the exhibitor;

that, in furtherance of the combination and conspiracy, the distributors have ever since refused to deal with him or furnish him with film service and have caused the unexpired contracts which he held with some of the distributors to be illegally and unlawfully cancelled and that he has ever since been and still is deprived of such service. As a result of the foregoing, the exhibitor asked judgment for three times the amount of damages which he had suffered as alleged.

Upon this complaint and an answer the case went to trial before a jury. After counsel for the exhibitor had made his opening statement to the jury the defendants in error moved the court for a directed verdict in their favor, upon the ground "that the petition and opening fail to state facts sufficient to constitute a cause of action arising under the Sherman Act, or any act amendatory thereof." The court sustained the motion and instructed the jury to return a verdict for the defendants, which was done. Thereupon judgment was entered upon the verdict dismissing the cause. In a memorandum opinion the trial judge states that he had reached the conclusion that the motion should be sustained upon the grounds: (1) That the petition does not show with sufficient clearness that the complaint is one over which the court has jurisdiction; (2) That it fails to show with sufficient clearness any combination or conspiracy sufficient to justify the court in proceeding further with the trial.

The case was taken by writ of error to the Circuit Court of Appeals where the judgment was affirmed for want of jurisdiction in the District Court. 280 Fed. 301.

First. Defendants in error have submitted a motion to dismiss the writ of error here. The statement of the ground is somewhat ambiguous, but it is, in substance, that the motion in the trial court attacked the complaint for a failure to state a cause of action under the Sherman Act; that this constituted a challenge to the jurisdiction

and, consequently, the writ of error should have been taken directly to this Court. But the motion below in terms was put upon the ground that the complaint and the opening statement failed to state facts sufficient to constitute a cause of action,—not that the court was without jurisdiction,—and it is this motion that was sustained. The memorandum, it is true, indicates that the trial judge was of opinion that the motion for a directed verdict went to the jurisdiction; but it is apparent that, as to this, he assumed that an unsuccessful attempt to allege facts sufficient to constitute a cause of action under a federal statute constitutes a jurisdictional defect.

Section 238 of the Judicial Code provides that appeals and writs of error may be taken from the district courts direct to this Court "in any case in which the jurisdiction of the [district] court is in issue." As it has been many times decided, the jurisdiction meant by the statute is that of the court as a federal court only, and not its jurisdiction upon general grounds of law or procedure. See, for example, *Louisville Trust Co.* v. *Knott,* 191 U. S. 225. The contention here seems to be broadly, that where the cause of action is based upon an act of Congress, unless the complaint states a case within the terms of the act the federal court is without jurisdiction.

Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction,

as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. *Weiland* v. *Pioneer Irrigation Co.*, 259 U. S. 498, 501; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576; *Matters* v. *Ryan*, 249 U. S. 375, 377; *Flanders* v. *Coleman*, 250 U. S. 223, 227; *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201, 203; *Lovell* v. *Newman & Son*, 227 U. S. 412, 421; *Denver First National Bank* v. *Klug*, 186 U. S. 202, 204; *Louie* v. *United States*, 254 U. S. 548; *Hart* v. *Keith Exchange*, 262 U. S. 271, 273; *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. In that event the claim of federal right under the statute, is a mere pretence and, in effect, is no claim at all. Plainly there is no such want of substance asserted here. In the case last cited this Court said (p. 25):

"We are speaking of a case where jurisdiction is incident to a Federal statutory cause of action. Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act, and a decision that a patent is bad, whether on the facts or the law, is as binding as one that it is good. See *Fauntleroy* v. *Lum*, 210 U. S. 230, 235. No doubt if it should appear that the plaintiff was not really relying upon the patent law for his alleged rights, or if the claim of right were frivolous, the case might be dismissed. In the former instance the suit would not really and substantially involve a controversy within the jurisdiction of the court, *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 287, 288, and in the latter the jurisdiction would not be denied, except possibly in form. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 109. But if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad."

In *Lamar* v. *United States*, 240 U. S. 60, this Court dealt with the question whether the failure of an indict-

ment to charge a crime against the United States presented a question of jurisdiction within the meaning of § 238 of the Judicial Code. The Court held in the negative, saying (p 64):

"Jurisdiction is a matter of power and covers wrong as well as right decisions. *Fauntleroy* v. *Lum,* 210 U. S. 230, 234, 235. *Burnet* v. *Desmornes,* 226 U. S. 145, 147. There may be instances in which it is hard to say whether a law goes to the power or only to the duty of the court; but the argument is pressed too far. A decision that a patent is bad, either on the facts or on the law, is as binding as one that it is good. *The Fair* v. *Kohler Die Co.,* 228 U. S. 22, 25. And nothing can be clearer than that the District Court, which has jurisdiction of all crimes cognizable under the authority of the United States (Judicial Code of March 3, 1911, c. 231, § 24, second), acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case."

Our attention is directed to certain decisions of this Court which are said to support the contention of defendants in error. We think their effect is misapprehended. In *The Steamship Jefferson,* 215 U. S. 130, the case had been dismissed below expressly for want of jurisdiction. It was asserted in support of a motion to dismiss the appeal that while in form of expression the suit was so dismissed, the action of the lower court was, "in substance, alone based upon the conclusion that the facts alleged were insufficient to authorize recovery, even although the cause was within the jurisdiction of the court." It was held, however, that the conclusion of the District Court was one which went to the jurisdiction, not to the sufficiency of the allegations of the bill; and there is no suggestion in the opinion that the two prop-

ositions are equivalent. In *The Ira M. Hedges,* 218 U. S. 264, where the same condition was presented, this Court, after pointing out the difficulty of sometimes distinguishing between matters going to the jurisdiction and those determining the merits and suggesting that it might be said that there the two considerations coalesced, rested its decision upon the form of the decree, saying (p. 270):

"At all events, the form of the decree must be taken to express the meaning of the judge. If the decree was founded, as it purports to be, on a denial of jurisdiction in the court, this court has jurisdiction of the appeal. For all admiralty jurisdiction belongs to courts of the United States as such, and therefore the denial of jurisdiction brings the appeal within the established rule. See *The Steamship Jefferson,* 215 U. S. 130, 138."

In *Blumenstock Brothers* v. *Curtis Publishing Co.,* 252 U. S. 436, 441, it is said:

"In any case alleged to come within the federal jurisdiction it is not enough to allege that questions of a federal character arise in the case, it must plainly appear that the averments attempting to bring the case within federal jurisdiction are real and substantial."

The only authority cited in support of this statement is *Newburyport Water Co.* v. *Newburyport, supra,* where, at p. 576, the rule is stated thus:

". . . it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit."

While the *Blumenstock Case* seems to put the emphasis of the test in the opposite way, it cannot be supposed that it was meant to modify the doctrine of the *Newburyport Case,* since its citation as authority is made without qualification.

It follows that the motion to dismiss the writ of error must be denied.

Second. We come then to consider whether the averments of the complaint are sufficient to constitute a cause of action under the Anti-Trust Act; and this inquiry involves two questions: (1) Are the alleged transactions in which the exhibitor was engaged matters of interstate commerce, and (2) Do the alleged acts of the defendants in error constitute a combination or conspiracy in restraint thereof?

1. The film contracts were between residents of different States and contemplated the leasing by one to the other of a commodity manufactured in one State and transported and to be transported to and used in another. The business of the distributors of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one State, finding customers for it in other States, making contracts of lease with them, and transporting the commodity leased from the State of manufacture into the States of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character "it continues at least until the load reaches the point where the parties originally intended that the movement should finally end." *Illinois Central R. R. Co.* v. *Louisiana R. R. Comm.*, 236 U. S. 157, 163. And see, *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105,

113; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 349.

In *Swift & Co.* v. *United States*, 196 U. S. 375, 398, it was held that where cattle were sent for sale from a place in one State, with the expectation that the transit would end after purchase in another State, the only interruption being that necessary to find a purchaser at the stockyards, and this was a typical, constantly recurring course, the whole transaction was one in interstate commerce and the purchase a part and incident of it. It further appeared in that case that Swift & Company were also engaged in shipping fresh meats to their respective agents at the principal markets in other cities for sale by such agents in those markets to dealers and consumers; and these sales were held to be part of the interstate transaction upon the ground "that the same things which are sent to agents are sold by them, and . . . some at least of the sales are of the original packages. Moreover, the sales are by persons in one State to persons in another." In the same case in the court below, 122 Fed. 529, 533, upon this branch of the case, it is said:

"I think the same is true of meat sent to agents, and sold from their stores. The transaction in such case, in reality, is between the purchaser and the agents' principal. The agents represent the principal at the place where the exchange takes place; but the transaction, as a commercial entity, includes the principal, and includes him as dealing from his place of business."

The most recent expression of this Court is in *Stafford* v. *Wallace*, 258 U. S. 495, 516, where, after describing the process by which livestock are transported to the stockyards and thence to the purchasers, it is said:

"Such transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be

obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity."

The transactions here are essentially the same as those involved in the foregoing cases, substituting the word " film " for the word " livestock," or " cattle," or " meat." Whatever difference exists is of degree and not in character.

The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause. *Stafford* v. *Wallace, supra,* pp. 525–527; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 245.

2. The distributors, according to the allegations of the complaint, controlled the distribution of all films in the United States and the exhibitor could not procure them from others. The direct result of the alleged conspiracy and combination not to sell to the exhibitor, therefore, was to put an end to his participation in that business. Interstate commerce includes the interstate purchase, sale, lease, and exchange of commodities, and any combination or conspiracy which unreasonably restrains such purchase, sale, lease or exchange is within the terms of the Anti-Trust Act, denouncing as illegal every contract, combination or conspiracy " in restraint of trade or commerce among the several States." The allegation of the complaint is that the exhibitor had been procuring films from some of the distributors but had refused to buy from

others, who thereupon induced the former to cease dealing with him, and that all then combined and conspired, in restraint of interstate trade and commerce, to prevent him from carrying on his said business; that they have ever since refused to furnish him with film service and have caused unexpired contracts which he held with some of them to be illegally cancelled. It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it and that, in effect, so far as the exhibitor is concerned, is what the distributors in combination are charged with doing and intending to do. It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. See *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, 99; *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 191. The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under them—leasing, transportation and delivery of films—was interstate commerce. The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and "restrict, in that regard, the liberty of a trader to engage in business," *Loewe* v. *Lawlor*, 208 U. S. 274, 293, and, as a necessary corollary, to restrain interstate trade and commerce, in violation of the Anti-Trust Act.

The judgments of the courts below are reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

WEBB, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL. *v.* O'BRIEN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 26. Argued April 23, 24, 1923.—Decided November 19, 1923.

1. A citizen can have no legal right to enter into a contract involving land with an alien who cannot legally make and carry out the contract. P. 321.
2. In the absence of a treaty to the contrary, a State has power to deny aliens the right to own land within its borders. P. 322.
3. A cropping contract between an owner of land in California and a Japanese alien, which, though it may not amount to a lease or a transfer of an interest in real property, is more than a contract of employment in that it gives the alien a right to use, and have a share in the benefit of, the land for agricultural purposes, exceeds the privileges granted to such aliens by Art. I of the treaty of February 21, 1911, 37 Stat. 1504, between the United States and Japan, and is forbidden by the California Alien Land Law, which denies to aliens ineligible to citizenship permission to have or enjoy any privilege, not prescribed in the treaty, in respect to the use or the benefit of land for agricultural purposes. P. 322.
4. In forbidding such contracts, the state law violates no right of the landowner or the alien under the Federal Constitution. P. 324.

See *Terrace* v. *Thompson, ante,* 197; *Porterfield* v. *Webb, ante,* 225. *Truax* v. *Raich,* 239 U. S. 33, distinguished.

279 Fed. 117, reversed.

APPEAL from a decree of the District Court granting an interlocutory injunction, in a suit to enjoin state officials from instituting proceedings to enforce the California Alien Land Law.

Mr. U. S. Webb, Attorney General of the State of California, with whom *Mr. Frank English,* Deputy Attorney General, and *Mr. C. C. Coolidge* were on the brief, for appellants.

I. The law of landlord and tenant, and the distinction drawn by the courts between the title of a lessee and the

mere right to compensation of a cropper, have developed in consideration of the mutual rights of the parties to these agreements and the rights of third parties other than the State.

II. The State of California is not concerned with the rights that the law of real property may or may not give to such a cropper to assign the growing crop. The State is interested in preventing such a cropper, if he be an alien ineligible to citizenship, actually enjoying the possession and dominion of the land.

Here we should have practical dominion of the soil by this particular ineligible alien. His interests would demand that he cultivate the soil according to his own theories and impose thereon such living environments as would be most conducive to his own advantage, just as he would if he owned the land.

The influence, standard of living, agricultural ideas and economic theories of this alien would prevail. The knowledge of husbandry gained from this experience would redound to the benefit of this alien. In the case of regular "employment," the theories of the owner of the land would prevail and such an owner would be the gainer by reason of this experience.

One important reason for the rule that we find in some States, that a cropper has no interest in the land, is to protect the owner of the land from the results that would follow, as a matter of law, if the arrangement were considered a lease, and complete title to the crop thus vested in the cropper as a lessee up to the time of the division of the crop. *Guest* v. *Opdyke,* 31 N. J. L. 552; *Caswell* v. *Districh,* 15 Wend. 379.

Other cases hold against the theory of a lease, so as to vest sufficient title to the crop in the owner of the land, to permit of the owner joining as a plaintiff in actions brought to protect the crop. None of the results that should be avoided need happen in California if in this

case it is determined that the cropper has such an interest in the land as to violate the California Alien Land Act. See *Johnson* v. *Hoffman,* 53 Mo. 504.

III. The rule established by the California Supreme Court, on cropping contracts, is that the landowner and the cropper may be tenants in common of the crop and at the same time the cropper may have an interest in the land. This is a different rule than that which exists in some other jurisdictions. *Bernal* v. *Hovious,* 17 Cal. 541; *Walls* v. *Preston,* 25 Cal. 60; *Knox* v. *Marshall,* 19 Cal. 617; *Smith* v. *Schultz,* 89 Cal. 526; and see *Moulton* v. *Robinson,* 27 N. H. 550; *Warner* v. *Abbey,* 112 Mass. 355; *Ferris* v. *Hoglan,* 121 Ala. 240; *Dixon* v. *Niccolls,* 39 Ill. 372; *McNeal* v. *Rider,* 79 Minn. 153; *Strangeway* v. *Eisenman,* 68 Minn. 395.

Mr. Louis Marshall for appellees.

I. The cropping contract, the execution of which the appellants contend would subject the parties to punishment by imprisonment or fine, or both, and would immediately result in an escheat of the land to which it relates to the State of California, does not come within the terms of the act, because it does not effect a transfer of real property or of an interest therein.

This statute does not undertake to prohibit any aliens from entering into a contract for the performance of labor upon agricultural lands within the State of California. Had it attempted to do so, the effort would have been nugatory, because it would clearly offend against the provision of the Fourteenth Amendment which guarantees them against deprivation of their liberty and property without due process of law. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; *Whitfield* v. *Hanges,* 222 Fed. 745; § 1977, U. S. Rev. Stats.

In order to give the statute of 1920 any constitutional effect whatever (which we have contended, in the *Porter-*

field Case, [*ante,* 225,] cannot be done,) it must relate to the acquisition of the title of real property or of an interest therein. That is the only reasonable significance that can attach to the language of §§ 1, 2, and 3, and is emphasized by other parts of the act.

The contract here does not constitute a transfer of real property. It is in its essence a contract of employment. It contains not a single word or phrase essential to the creation of a lease. It does not convey or transfer any land to Inouye; it does not provide for the payment by him of any rent. It does not give to him the general possession of the land, but, on the contrary, the general possession is reserved to O'Brien, the owner. It does not confer upon him the ownership of the crops growing on the land. It does not even provide that he shall give to the owner any part of the crops produced. On the contrary, O'Brien, the owner, is to compensate Inouye for his labor and services, by giving to him one-half of the crops grown on the land, and in order to avoid any possibility of a misinterpretation the instrument merely permits Inouye to work the land and provides that he shall have no interest or estate whatsoever in it. There is not a word which would justify an inference that the contract was anything else than a contract for personal services rendered by Inouye. Nor does it by its terms inure to or bind his personal representatives or assigns. From the beginning to the end of the document the relation between the parties as that of employer and employee is meticulously maintained.

To sustain the appellants' contention would involve the escheat of O'Brien's property—a forfeiture—and the imprisonment or fine, or both fine and imprisonment, of both O'Brien and Inouye, under the penal provisions of the act. The law abhors a forfeiture.

Statutes in derogation of common-law rights, *Meister* v. *Moore,* 96 U. S. 79; *Shaw* v. *Railroad Co.,* 101 U. S.

565; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Thompson* v. *Thompson*, 218 U. S. 618; and all statutes of a penal nature, whether civil or criminal, must be construed strictly in favor of those whom they affect, irrespective of whether the penalty is forfeiture of property, fine, or imprisonment.

If the acts alleged do not come clearly within the prohibition of the statute, its scope will not be extended to include other offenses than those which are clearly prescribed and provided for; and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant.

Whatever differences may have existed at an earlier period as to the effect of cropping contracts, the law is now well settled, and unless the provisions of the agreement clearly indicate an intent to create a leasehold or to confer an interest in land on which the work is to be done, the relation between the owner of the property and the person cultivating the land is regarded as that of employer and employee. 1 Washburn, Real Property, 5th ed., p. 604; 2 Reeves, Real Property, § 564; Jones, Landlord and Tenant, § 49; Warvelle, Ejectment, § 26; McAdam, Landlord and Tenant, 4th ed., § 45; 17 Corpus Juris, p. 382; *Caswell* v. *Districh*, 15 Wend. 378; *Putnam* v. *Wise*, 1 Hill, 234; *Bernal* v. *Hovious*, 17 Cal. 541; *Walls* v. *Preston*, 25 Cal. 59; *Clarke* v. *Cobb*, 121 Cal. 595; *Taylor* v. *Bradley*, 39 N. Y. 129; *Unglish* v. *Marvin*, 128 N. Y. 380; *Reynolds* v. *Reynolds*, 48 Hun, 142; *Vaughn* v. *DeWandler*, 63 How. Pr. 380; *Booher* v. *Stewart*, 75 Hun, 214; *Estate of Ellis*, 78 Misc. 589; *Stall* v. *Wilbur*, 77 N. Y. 158; *Sexton* v. *Breese*, 135 N. Y. 391; *Crosby* v. *Woleben*, 149 App. Div. 338; *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142 U. S. 396; *Taylor* v. *Donahoe*, 125 Wis. 513; *Guest* v. *Opdyke*, 31 N. J. L. 552; *State* v. *Jewell*, 34 N. J. L. 259; *State* v. *Reynolds*, 67 N. J. L. 169; and many other cases. Distinguishing, *Smith* v. *Schultz*,

89 Cal. 526; *Dixon* v. *Niccolls,* 39 Ill. 372; *Ferris* v. *Hoglan,* 121 Ala. 240; *Strangeway* v. *Eisenman,* 68 Minn. 395; and *McNeal* v. *Rider,* 79 Minn. 153.

It is well settled that a cropper may not maintain trespass or ejectment for a wrongful entry upon the premises on which he carries on his work. *Bradish* v. *Schenck* 8 Johns. 151; *Hare* v. *Celey,* Cro. Eliz. 143; *Decker* v. *Decker,* 17 Hun, 14; *Taylor* v. *Bradley,* 39 N. Y. 12.

II. There is no merit in the suggestion that the act under consideration in any manner effected a change in the principles controlling a cropper's contract and its legal effect, so as to convert it into a lease and a transfer of an interest in land, and thus make it the basis of a forfeiture and a criminal prosecution.

If the State of California had regarded such a contract as an evil, it would have been a very simple matter to have used appropriate language in the statute to forbid a landowner or an alien from entering into such a contract.

A failure to express what it would have been easy to say is significant and frequently decisive. *United States* v. *Chase,* 135 U. S. 259; *National Bank* v. *Matthews,* 98 U. S. 627; *Tompkins* v. *Fort Smith Ry.,* 125 U. S. 127; *Tillson* v. *United States,* 100 U. S. 46; *Railroad Co.* v. *Grant,* 98 U. S. 403; *United States* v. *First Natl. Bank,* 234 U. S. 262.

The fact that the authorities are at one in declaring that such an agreement as that in the case at bar is one of employment, and does not confer an interest in land, shows beyond a doubt that there is nothing in this statute which amounts to an exercise by the State of that dominion which appellants are seeking to ascribe to it.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit brought by the appellees to enjoin the Attorney General of California and the District Attorney

of Santa Clara County from instituting any proceedings to enforce the California Alien Land Law [1] against them.

O'Brien is a citizen and resident of California, and owns ten acres of agricultural land in the county of Santa Clara.

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[1] Initiative Measure adopted November 2, 1920. Statutes 1921, p. lxxxiii.

Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

Section 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

Section 3 provides that any company, association or corporation a majority of whose members are ineligible aliens or in which a majority of the issued capital stock is owned by such aliens is permitted to acquire, possess, enjoy and convey real property or any interest therein, in the manner and to the extent and for the purposes prescribed by any treaty, etc. Hereafter, ineligible aliens may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty . . . and not otherwise.

Section 4 provides that no ineligible alien and no company, association or corporation mentioned in § 3 may be appointed guardian of that portion of the estate of a minor which consists of property which such alien or such company, association or corporation is inhibited from acquiring, possessing, enjoying or transferring by reason of the provisions of the act. The superior court may remove the guardian of such an estate whenever it appears to the satisfaction of the court that facts exist which would make the guardian ineligible to appointment in the first instance.

Section 5(a). The term "trustee" as used in this section means any person, company, association or corporation that as guardian, trustee, attorney-in-fact or agent, or in any other capacity has the title, custody or control of property, or some interest therein, belonging to an ineligible alien or to the minor child of such an alien, if the

Inouye is a capable farmer, and is a Japanese subject living in California. O'Brien and Inouye desire to enter into a cropping contract covering the planting, cultivating

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property is of such a character that such alien is inhibited from acquiring, possessing, enjoying or transferring it.

(b). Annually every such trustee must file a verified written report showing: . . . (3) An itemized account of all expenditures, investments, rents, issues and profits in respect to the administration and control of such property with particular reference to holdings of corporate stock and leases, cropping contracts and other agreements in respect to land and the handling or sale of products thereof is required of such trustee.

Section 6 provides for sale and distribution of proceeds when, by reason of the provisions of the act, any heir cannot take real property or membership or shares of stock in a company, association or corporation.

Section 7 provides for the escheat of property acquired in fee by any ineligible alien and that no alien, company, association or corporation mentioned in § 2 or § 3 hereof shall hold for a longer period than two years, the possession of any agricultural land acquired in the enforcement of or in satisfaction of a mortgage or other lien hereafter made or acquired in good faith to secure a debt.

Section 8. Any leasehold or other interest in real property less than a fee, hereafter acquired in violation of the provisions of this act by any ineligible alien or by any company, association or corporation mentioned in section 3 of this act, shall escheat to the State of California. . . . Any share of stock or interest of any member in a company, association or corporation hereafter acquired in violation of the provisions of section 3 of this act shall escheat to the State of California.

Section 9. Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state if the property interest involved is of such a character that an ineligible alien is inhibited from acquiring, possessing, enjoying or transferring it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

Section 10. If two or more persons conspire to effect a transfer of real property, or of an interest therein, in violation of the provisions hereof, they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both.

and harvesting of crops to be grown on the land. They allege that the execution of such a contract is necessary in order that the owner may receive the largest return from the land, and that the alien may receive compensation therefrom; that the Attorney General and District Attorney have threatened to and will enforce the act against them if they execute the contract, and will forfeit or attempt to forfeit the land by an escheat proceeding, and will prosecute them criminally for violating the act. They aver that the act is so drastic, and the penalties for its violation are so great, that neither of them may execute the contract even for the purpose of testing its validity and its application thereto; and that, unless the court shall determine the validity of the act and its application, they will be compelled to submit to it, whether valid or invalid, and to the appellants' interpretation of it, and so be deprived of their property without due process of law and denied the equal protection of the laws in contravention of the Fourteenth Amendment.

Appellees applied for an interlocutory injunction. The matter was heard by three judges, as provided in § 266 of the Judicial Code. The injunction was granted, and the Attorney General and District Attorney appealed.

O'Brien, who is a citizen, has no legal right to enter into the proposed contract with Inouye, who is an ineligible Japanese alien, unless the latter is permitted by law to make and carry out such a contract. At common law, aliens, though not permitted to take land by operation of law, may take by the act of the parties; but they have no capacity to hold against the State, and the land so taken may be escheated to the State. See *Fairfax's Devisee* v. *Hunter's Lessee,* 7 Cranch, 603, 609, 619, 620; *Governeur's Heirs* v. *Robertson,* 11 Wheat. 332, 355; *Phillips* v. *Moore,* 100 U. S. 208, 212; *Atlantic & Pacific R. R. Co.* v. *Mingus,* 165 U. S. 413, 431. In the absence of

a treaty to the contrary, the State has power to deny to aliens the right to own land within its borders. *Terrace* v. *Thompson, ante,* 197; *Hauenstein* v. *Lynham,* 100 U. S. 483, 484, 488; *Blythe* v. *Hinckley,* 127 Cal. 431, affirmed 180 U. S. 333, 340; *Ex parte Okahara,* 216 Pac. 614. The provision of the act which limits the privilege of ineligible aliens to acquire real property or any interest therein to that prescribed by treaty is not in conflict with the Fourteenth Amendment. *Terrace* v. *Thompson, supra; Porterfield* v. *Webb, ante,* 225; *Ex parte Okahara, supra.* The treaty between the United States and Japan (37 Stat. 1504–1509) does not confer upon the citizens or subjects of either in the territories of the other the right to acquire, possess or enjoy lands for agricultural purposes. *Terrace* v. *Thompson, supra; Ex parte Okahara, supra.*

By the proposed cropping contract, Inouye is given the right for a term of four years to plant, cultivate and harvest crops—berries and vegetables—on the land, and to be free from interference by the owner, who undertakes to protect him during the term against interference by any other person. He is entitled to housing for himself, and is granted the right to employ others to work on the land, and to give to them free ingress and egress and the right to live on the land. He is entitled to one-half of all crops grown on the land during the term, to be divided after they are harvested and before removal from the land, and is given a reasonable time after the expiration of the term to remove his share of the crops. He is required to accept his share of the crops as reimbursement for expenditures made to carry on the farming operations, and as his only return from the undertaking. Assuming that the proposed arrangement does not amount to a leasing or to a transfer of an interest in real property, and that it includes the elements of a contract of employment (*Ex parte Okahara, supra*), we are of opinion that it is more than a contract of employment; and that, if executed, it will give to

Inouye a right to use and to have or share in the benefit of the land for agricultural purposes. And this is so, notwithstanding other clauses of the contract to the effect that the general possession of the land is reserved to the owner, that the cropper shall have no interest or estate whatever in the land, that he is given one-half of all crops grown as compensation for his services and labor, and that division of the crops is to be made after they are harvested and before their removal from the land.

The treaty grants liberty to own or lease and occupy houses, manufactories, warehouses and shops, and to lease land for residential and commercial purposes.[2] Section 2 of the act extends the privilege to acquire, possess, enjoy and transfer real property or any interest therein only in the manner and to the extent and for the purposes prescribed in the treaty. The treaty gives no permission to enjoy, use or have the benefit of land for agricultural purposes. The privileges granted by the act are carefully limited to those prescribed in the treaty. The act as a whole evidences legislative intention that ineligible aliens shall not be permitted to have or enjoy any privilege in respect of the use or the benefit of land for agricultural purposes. And this view is supported by the circumstances and negotiations leading up to the making of the treaty. See *Terrace* v. *Thompson, supra; Same* v. *Same,* 274 Fed. 841, 844, 845. As applied to this case, the act may be read thus: "Ineligible aliens may own or lease houses, manufactories; warehouses and shops, and may lease land for residential and commercial purposes. These

[2]Article I. The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

things, but no possession or enjoyment of land otherwise, are permitted."

The term of the proposed contract, the measure of control and dominion over the land which is necessarily involved in the performance of such a contract, the cropper's right to have housing for himself and to have his employees live on the land, and his obligation to accept one-half the crops as his only return for tilling the land clearly distinguish the arrangement from one of mere employment. The case differs from *Truax* v. *Raich,* 239 U. S. 33. In that case, a statute of Arizona making it a criminal offense for an employer of more than five workers, regardless of kind or class of work or sex of workers, to employ less than eighty per cent. native born citizens of the United States was held to infringe the right, secured by the Fourteenth Amendment, of a resident alien to work in a common occupation—cooking in a restaurant. The right to make and carry out cropper contracts such as that before us is not safeguarded to ineligible aliens by the Constitution. A denial of it does not deny the ordinary means of earning a livelihood or the right to work for a living. The practical result of such contract is that the cropper has use, control and benefit of land for agricultural purposes substantially similar to that granted to a lessee. Conceivably, by the use of such contracts, the population living on and cultivating the farmlands might come to be made up largely of ineligible aliens. The allegiance of the farmers to the State directly affects its strength and safety. *Terrace* v. *Thompson, supra.* We think it within the power of the State to deny to ineligible aliens the privilege so to use agricultural lands within its borders.

The decision of the Supreme Court of California in *Ex parte Okahara, supra,* a *habeas corpus* case, does not support the appellees' contention. In that case an ineligible Japanese was held on a warrant charging him with conspiracy to effect a transfer of real property in violation

of § 10 of the Alien Land Law. The gravamen of the offense charged was that Okahara, in furtherance of the conspiracy, executed a contract with another, whereby the latter transferred to him for a term of five years an interest in 20 acres of agricultural land. The only question before the court in that case was whether the contract amounted to a transfer of real property or of an interest therein in violation of § 10. The court said: ". . . the instrument before us cannot be characterized as a lease or transfer of any interest in real property because it lacks many of the essential elements of a lease, while on the other hand it bears all the characteristics of an agreement of hiring. But if it cannot be said to be an agreement of employment pure and simple, it cannot under any rule of construction be held to be more than a cropping contract." After referring to the terms of the contract and reviewing authorities, it said: " The argument that the law forbids the making of a contract of employment or agreement to till the soil on shares can only be sustained by adopting the theory that the particular agreement under consideration transfers an interest in land." The court held that the contract did not violate § 10 and discharged Okahara. The contract in that case differs in important particulars from the one before us; but in the view we take of this case, we need not determine whether, within the meaning of the act, the contract between O'Brien and Inouye, if executed, would effect a transfer of an interest in real property. The question in this case is not whether the proposed contract is prohibited by § 10, but it is whether appellees have shown that they have a right under the Constitution or treaty to make and carry out the contract, and are entitled to an interlocutory injunction against the officers of the State. A negative answer must be given.

The privilege to make and carry out the proposed cropping contract, or to have the right to the possession, en-

joyment and benefit of land for agricultural purposes as contemplated and provided for therein, is not given to Japanese subjects by the treaty. The act denies the privilege because not given by the treaty. No constitutional right of the alien is infringed. It therefore follows that the injunction should have been denied.

The order appealed from is reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

FRICK ET AL. *v.* WEBB, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 111. Argued April 23, 24, 1923.—Decided November 19, 1923.

Section 3 of the California Alien Land Law, permitting aliens ineligible to citizenship to "acquire shares of stock in any . . . corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty . . . and not otherwise," renders illegal a contract between a citizen of the State and a Japanese alien for sale by the one to the other of shares in such a corporation, and is consistent with the treaty between the United States and Japan and the due process and equal protection clauses of the Fourteenth Amendment. P. 333. See *Porterfield* v. *Webb*, and *Webb* v. *O'Brien*, *ante*, pp. 225, 313.

281 Fed. 407, affirmed.

APPEAL from an order of the District Court refusing an interlocutory injunction in a suit to restrain officials of the State of California from enforcing the California Alien Land Law.

Mr. Louis Marshall for appellants.

I. Assuming that the ownership of shares of stock in a California corporation having the title to agricultural land constitutes an interest in such land, the California Alien Land Law, which forbids aliens ineligible to citizenship under the laws of the United States to acquire such shares, although the right to do so has been conferred on all other aliens, denies to the former the equal protection of the laws within the meaning of the Fourteenth Amendment.

II. The prohibition of the acquisition by an ineligible alien of shares of stock in a California corporation owning agricultural land, such shares being personal property, while all other aliens are expressly permitted to acquire such shares, denies to the former the equal protection of the laws.

The disability of aliens at common law in respect to ownership of real estate does not extend to personal property. Aliens are capable of acquiring, holding and transmitting it in the like manner as citizens. This includes the right to take and hold personal property by bequest, and the right of an alien testator to pass his personalty by will. *Calvin's Case,* 7 Coke, 17a; *Fourdrin* v. *Gowdey,* 3 Mylne & Keen, 397; 1 Black. Com. 372; 2 Kent Com. 62; *McLearn* v. *Wallace,* 10 Pet. 625; *Beck* v. *McGillis,* 9 Barb. 35; *Meakings* v. *Cromwell,* 5 N. Y. 136; *Cosgrove* v. *Cosgrove,* 69 Conn. 416; *Detwiler* v. *Commonwealth,* 131 Pa. St. 614; *Cleveland, etc. Ry. Co.* v. *Osgood,* 36 Ind. App. 34; *Marx* v. *McGlynn,* 88 N. Y. 357.

It has long been well settled that shares of stock in a corporation are personal property, whether they be declared such by statute, as is sometimes the case, or not, and whether the property of the corporation itself consists of realty, as in the case of mining, land, realty and canal companies, and the like, or of personal property only. Cal. Civ. Code, § 324.

The California courts have held shares of stock to be personalty.

That a sale of shares of stock comes within the terms of the statute of frauds, whether the act refers to "goods, wares and merchandise," or to "personal property," or to "goods or choses in action," is recognized, with practical unanimity, by the American courts.

This case presents an entirely different aspect from the one where the State is seeking to debar aliens from the ownership of real property in accordance with a policy that quite generally prevails and which, if applied equally to all aliens, would not militate against any constitutional prohibition. Even had the California act undertaken to declare a share of stock real estate, that would not have made it so, or have brought it within the reason of the rule which permits a State to inhibit ownership by aliens of real property within its territory.

Such legislation, even if made applicable to all aliens regardless of race, color or nationality, would come within the rule laid down in *Truax* v. *Raich,* 239 U. S. 33; *Ex parte Kotta,* 62 Cal. Dec. 315; *Fraser* v. *McConway & Torley Co.,* 82 Fed. 257; *State* v. *Montgomery,* 94 Me. 192; and *Truax* v. *Corrigan,* 257 U. S. 312; and would sin against the fundamental principle laid down in *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Gulf, Colo. & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, and the other leading cases in which the equality clause of the Fourteenth Amendment has been interpreted and applied.

The nature of a share of stock as property must be determined by its inherent characteristics and physical qualities, and not by a legislative fiat. In this act we have not, however, a prohibition of all aliens against the acquisition of the ownership of shares of stock in a corporation owning agricultural lands, but such right of ownership is sought to be withheld from aliens ineligible to citizenship solely because of their race, color and nationality.

By the same token, the legislature might make like restrictions with regard to the acquisition of shares of stock in a company authorized to possess lands for other than agricultural, residential and commercial purposes. That would include corporations operating mines, railways, oil properties, quarries and water works, all of which are basically founded on the ownership of land.

III. Under a fair interpretation of that portion of § 3 of the Alien Land Law on which the appellees rely, the proposed sale to and purchase by Satow of shares of stock of the Merced Farm Company is not prohibited.

IV. The act, as applied, is unconstitutional because it deprives the citizen appellant of the right to enter into a contract for the sale of his shares of stock and because it deprives the alien appellant of his liberty by debarring him from entering into a contract for the purchase of corporate shares. *Yick Wo* v. *Hopkins; Truax* v. *Raich; Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Smith* v. *Texas*, 233 U. S. 630; and *Coppage* v. *Kansas*, 236 U. S. 1.

V. Section 3 of the act, as interpreted by the State, offends against the treaty between the United States and Japan, which permits the citizens or subjects of the respective parties to have liberty "to carry on trade, wholesale and retail," in the respective territories of the contracting nations, "and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects."

To "carry on trade" is to engage in commerce in any or all of its various phases. It is the business of exchanging commodities by buying and selling them for money. Those commodities need not necessarily be merchandise, but, in the colloquial sense of the word, they may be such securities as are "traded in" on the exchanges or in transactions between man and man. *United States* v. *American Tobacco Co.*, 164 Fed. 700; *United*

States v. *Douglas*, 190 Fed. 482; *Finnegan* v. *Noerenberg*, 52 Minn. 239; *People* v. *Blake*, 19 Cal. 579; *State* v. *Hunt*, 129 N. C. 686; *May* v. *Sloan*, 101 U. S. 231; *Bank of United States* v. *Norton*, 10 Ky. 422; *Fleckner* v. *United States Bank*, 8 Wheat. 338; *Champion* v. *Ames*, 188 U. S. 321.

Mr. U. S. Webb, Attorney General of the State of California, with whom *Mr. Frank English*, Deputy Attorney General, and *Mr. Matthew Brady* were on the brief, for appellees.

I. The ownership of a share of stock in a California agricultural corporation constitutes an interest in agricultural lands, prohibited to ineligible aliens by the Alien Land Act. It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship,—in a practical way to prevent ruinous competition by the Oriential farmer against the American farmer. Those who drafted this legislation fully realized that such competition, working through the means of corporate entities, would have the exact practical effect as in the case of the identical individuals competing without having been organized in such corporate entities.

Shares in corporations in California are, of course, personal property, as that expression is commonly used with reference to the usual ownership of such shares. But they represent an interest in the corporation itself; and, if it owns real property, an interest in that to the extent of the shares of stock. The legal title is in the corporation, but as an agency for the real owners,—the stockholders. As such owners these ineligible aliens are subject to the control by the State of their interest in the agricultural lands.

The Japan Treaty might possibly be held to guarantee the right of this ineligible alien to own or inherit shares

in an ordinary commercial corporation engaged in trade or commerce, where no interest in the agricultural lands of California was involved. The courts have held that there is inherent in the States the power so to control their lands. Of what value would this be if the prohibited purpose might be accomplished through the mechanical device of a corporation? See the definitions of "land" in the Washington law involved in *Terrace* v. *Thompson* [*ante,* 197]. If this California corporation were dissolved, under § 400 of the Civil Code, the directors would become trustees, with full powers to sell all the assets. If the best interests of the stockholders required it, the agricultural land could be divided among them. The statute considers the stock as much an interest in land as is a leasehold interest.

Appellants urged before the District Court that § 3 of the act practically denies to ineligible aliens the right to hold any stock in any California corporation, because almost all of such corporations are "authorized to acquire, possess, enjoy or convey agricultural land." We are concerned, however, only with the facts as here presented. This particular corporation owns agricultural lands and no other properties of said corporation are described in the bill of complaint.

II. The treaty does not protect the ineligible alien appellant in acquiring the shares of stock because of their having certain attributes of personal property.

III. The Fourteenth Amendment does not protect either the ineligible alien appellant or the citizen appellant in their dealing with the shares of stock in this case on account of said shares having certain attributes of personal property.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit brought by the appellants to enjoin the above-named Attorney General and District Attorney

from enforcing the California Alien Land Law,[1] submitted by the initiative and approved by the electors, November 2, 1920, on the grounds that it is in conflict with the due process and equal protection clauses of the Fourteenth Amendment, and with the treaty between the United States and Japan.

Appellants are residents of California. Frick is a citizen of the United States and of California. Satow was born in Japan of Japanese parents and is a subject of the Emperor of Japan. Frick is the owner of 28 shares of the capital stock of the Merced Farm Company, a corporation organized under the laws of California, that owns 2,200 acres of farm land in that State. Frick desires to sell the shares to Satow and Satow desires to buy them. By the complaint, it is alleged in substance that the appellees have threatened to and will enforce the act against appellants if Frick sells such stock to Satow, and will institute proceedings to escheat such shares to the State as provided in the act; that, but for the provisions of the act and such threats, Frick would sell and Satow would buy the stock. And it is averred that the act is so drastic and the penalties attached to its violation are so great that appellees are deterred from carrying out the sale, and that unless the court shall determine its validity in this suit, appellants will be compelled to submit to it whether valid or invalid.

Appellants applied for an interlocutory injunction to restrain appellees during the pendency of the suit from instituting any proceeding to enforce the act against appellants. The application was heard by three judges as provided in § 266 of the Judicial Code. The motion was denied, and the case is here on appeal from that order.

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[1] The substance of the portions of the act which are material in this case is printed in the margin of *Webb* v. *O'Brien*, decided this day, *ante*, 319.

In *Porterfield* v. *Webb, ante,* 225, and *Webb* v. *O'Brien,* decided this day, *ante,* 313, we held that the act does not conflict with the Fourteenth Amendment or with the treaty between the United States and Japan. In the case first mentioned, we held that the act prohibits the leasing of agricultural land by citizens of the United States to a Japanese alien, and in the latter that it prohibits the making of a cropping contract between a citizen and a Japanese alien.

The treaty does not grant permission to the citizens or subjects of either of the parties in the territories of the other to own, lease, use or have the benefit of lands for agricultural purposes, and, when read in the light of the circumstances and negotiations leading up to its consummation, the language shows that the parties respectively intended to withhold a treaty grant of that privilege. *Terrace* v. *Thompson, ante,* 197; *Same* v. *Same,* 274 Fed. 841, 844, 845. The applicable provision of § 3 of the act is: Hereafter all ineligible aliens "may . . . acquire shares of stock in any . . . corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural land, in the manner and to the extent and for the purposes prescribed by any treaty . . . and not otherwise." The provisions of the act were framed and intended for general application and to limit the privileges of all ineligible aliens in respect of agricultural lands to those prescribed by treaty between the United States and the nation or country of which such alien is a citizen or subject. The State has power, and the act evidences its purpose to deny to ineligible aliens permission to own, lease, use or have the benefit of lands within its borders for agricultural purposes. *Webb* v. *O'Brien, supra.* "As the State has the power . . . to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective." *Crane* v. *Campbell,* 245 U. S. 304, 307, and

cases cited; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303. It may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens. The right "to carry on trade" given by the treaty does not give the privilege to acquire the stock above described. To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties. We hold that the provision of § 3 above referred to does not conflict with the Fourteenth Amendment or with the treaty.

The order appealed from is affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

STREET, SUING ON BEHALF OF HIMSELF AND ALL OTHER SEAMEN ENGAGED IN INTERSTATE AND FOREIGN COMMERCE BY SEA, ETC. *v.* SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 156. Argued November 15, 1923.—Decided November 26, 1923.

Plaintiff, alleging that defendants, as organizations of shipowners, controlled all American vessels in the merchant service operating between the ports of the Pacific Coast in the United States, and between such ports and foreign ports, and collectively employed all seamen engaged in that commerce, attacked the regulations adopted by defendants to govern such employments, upon the

grounds that they dealt with matters covered by the Shipping Commissioners Act and other acts of Congress amendatory and supplemental thereof, trenched upon the exclusive power of Congress to regulate interstate and foreign commerce, and violated the rights of the plaintiff and other seamen by imposing undue restrictions upon their opportunities to secure engagements, and interfered with competition between them. Upon a motion to dismiss for failure to state a cause of action and for lack of jurisdiction, the District Court, expressing the opinion that the regulations did not violate the act above mentioned or the Anti-Trust Act, and that the plaintiff had no standing to seek the relief prayed, entered a decree dismissing the bill.

Held, that the decree was not appealable directly to this Court under § 238, Jud. Code, but should be transferred to the Circuit Court of Appeals under § 238a. P. 340.

Cause transferred to Circuit Court of Appeals.

APPEAL from a decree of the District Court which, on motion, dismissed the bill in a suit to restrain the appellees from enforcing rules adopted by them to regulate the employment of seamen.

Mr. H. W. Hutton for appellant.

I. The question of the jurisdiction of the lower court is not here involved.

II. The appeal involves the construction and application of the Constitution of the United States.

Appellees own, operate or control all of the vessels engaged in interstate and foreign commerce on the Pacific Coast; such vessels are one of the instrumentalities of such commerce, the crews are the other, and combined they are engaged in a public service. The Commerce Clause gives Congress the exclusive right to regulate the method of selection, engagement, discharge and all other things relating to the employment of seamen on such vessels, and it has done so. The regulation of such matters by any other authority is an unconstitutional burden on the commerce itself.

Appellant has been engaged as a seaman in such commerce for years; appellees, however, have set up a con-

tinuing refusal to employ him unless he conforms to the rules and regulations they have prescribed. Applying for employment under such circumstances would be an idle act.

Appellees concede the right of an individual to a free market for his labor, but contend that nothing short of a black-list system, maliciously used, or some other malicious combination is a violation of that right. The presence or absence of malice is, however, immaterial. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418. Any interference with the right of a free market for labor or the carrying on of a business is an invasion of a person's constitutional rights. *Hilton* v. *Eckersley*, 6 Ellis & Bl. 47; *Curran* v. *Galen*, 152 N. Y. 33; *Plant* v. *Woods*, 176 Mass. 492; *Mogul S. S. Co.* v. *McGregor*, 23 Q. B. D. 598; *Erdman* v. *Mitchell*, 207 Pa. St. 79; *Berry* v. *Donovan*, 188 Mass. 353; *Jones* v. *Leslie*, 61 Wash. 107; *People* v. *McFarlin*, 89 N. Y. S. 527; *State* v. *Chapman*, 69 N. J. L. 464; *Slaughter-House Cases*, 16 Wall. 36; *Sailors Union* v. *Hammond Lumber Co.*, 156 Fed. 454; *Gleason* v. *Thaw*, 185 Fed. 345; *Ritchie* v. *People*, 155 Ill. 98; *Gillespie* v. *People*, 188 Ill. 176.

The rules and regulations commence with the initial selection of the man and continue as long as he is engaged in the business, and, in addition, he must take his turn for employment. The seaman's right to engage freely in interstate and foreign commerce is thus trespassed upon.

But the initial supplying of seamen is within the Commerce Clause. *Patterson* v. *Bark Eudora*, 190 U. S. 169. Such matters are within the exclusive domain of Congress, and, if a State is impotent to obstruct interstate commerce, it cannot be that any mere voluntary association of individuals has a power which the State itself does not possess. *Loewe* v. *Lawlor*, 208 U. S. 303, 304.

III. Seamen are as much an instrument of commerce as the vessels. If they are hindered in their efforts to en-

gage in interstate and foreign commerce, they have a complaint. *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344. Congress has legislated concerning the initial selection of seamen and provided for their discharge and a certificate thereof, Rev. Stats., §§ 4514, 4515, 4549–4551, 4553. Any other mode of performing the same matters must be a restraint, burden and obstruction upon the freedom of those engaged in the business.

Mr. Warren Olney, Jr., with whom *Mr. W. F. Sullivan, Mr. Edward J. McCutchen, Mr. J. M. Mannon, Jr.*, and *Mr. A. Crawford Greene* were on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The case is displayed by the complaint of appellant (he was plaintiff in the court below) as follows: He is a native born resident of California, and a seaman, and has been engaged in interstate and foreign commerce by sea upon vessels plying between ports on the Pacific coast, and between such ports and foreign ports, and is desirous of continuing to work on such vessels.

He is associated by and through an unincorporated association of persons called the International Seamen's Union of America, with over ten thousand other persons working as seamen, and he brings this action in his own behalf and theirs, the acts of which he complains being a matter of common and general interest to him and them.

The Shipowners' Association of the Pacific Coast is a California corporation having its place of business in the City of San Francisco, it being a membership corporation under the laws of the State, composed of every person, firm, corporation or association owning or acting as managing owner of every vessel engaged in interstate and foreign commerce documented in the different offices of

the different Collectors of United States Customs on the Pacific coast.

The Pacific American Steamship Association is a voluntary unincorporated association of individuals and corporations owning and operating vessels flying the American flag and engaged in the merchant service between Pacific coast ports and foreign ports. It has its place of business in San Francisco.

It and the Shipowners' Association control every vessel engaged in the merchant service between such ports and collectively employ all seamen engaged in that service.

On the 1st day of January, 1922, the defendants combined to restrain the freedom of appellant and all other seamen on the Pacific coast to engage in such service, and to compel all seamen who desire to engage in such interstate and foreign trade and commerce each to register and take a number and take his turn for employment according to such number, which frequently prevents seamen of good qualifications and well-known from obtaining employment at once, when, owing to their being well-known among the masters and other officers of vessels and owing to their good qualifications as seamen, they could and would obtain work at once; and as a condition of such employment the Associations also compel all seamen to take and carry a book upon which is printed, among other things, the following:

"Employment Service Bureau.

"Pacific American Steamship Association, Shipowners' Assn. of the Pacific Coast, San Francisco, California.

"This certificate and discharge is issued under the authority of the Pacific American Steamship Association and the Shipowners' Association of the Pacific Coast, and no person will be employed by these associations unless he is registered at their employment offices and has in his possession this Certificate and Discharge.

"The lawful holder of this certificate will deliver it to the master of the vessel when he signs articles of Agreement, and the master will retain the same in his possession until the seaman is discharged or has left the employment.

"To Seamen:

"When you receive this book you will be given a registered number which will be placed in the back of this book. When you leave your ship you must report to the Employment Service Bureau and get a new registered number. This registration number is given you when you apply for a job and has nothing to do with the number printed on the book. A fee will be charged for this book sufficient to cover the cost of the same."

In addition to the foregoing there is required to be written therein certain particulars of identification and the total years of the seaman's experience. His photograph is also required to be attached to the book.

The said matters are regulations of commerce among the several States and with foreign nations, in violation of subdivision 3 of § 8, of Article I, of the Constitution of the United States, and have been fully provided for by the Congress of the United States in the Act of June 7, 1872, c. 322, 17 Stat. 262, commonly known as the Shipping Commissioners Act, and the various acts of Congress amendatory and supplemental thereto, in so far as it is necessary to such commerce that they should be provided for.

The regulations are humiliating to all seamen and the best seamen refuse to abide by them and are leaving the seafaring calling. Appellant refuses to engage in such commerce thereunder and is suffering loss and damage because he cannot obtain employment without obeying them. The Associations threaten to and will continue to enforce the regulations unless restrained. The taking of turns in employment by seamen or being employed ac-

cording to number is destructive of competition among those who wish to engage as seamen, and the regulations trench upon the exclusive right of the Congress of the United States to make such regulations.

Neither appellant nor any other seaman has an adequate remedy at law and an injunction is prayed against the enforcement of the regulations.

The appellee Associations each filed a motion to dismiss, which expressed in various ways the insufficiency of the complaint to constitute a cause of action, and also that the court had no jurisdiction to hear and determine the suit.

The motions were granted. The court expressed the opinion that the defendants' regulations did not violate the Shipping Commissioners Act (§ 4501, *et seq.* Rev. Stats.), nor the Anti-Trust Law, and held besides that appellant "is not shown to have any standing entitling him to seek in court the general relief for which he prays." And further said, "He is not in a position to vindicate general governmental policies, nor is he 'the agency to establish the public welfare.'"

A decree was entered dismissing the complaint, to review which this appeal was obtained, and is prosecuted.

The assignment of errors attacks the decree with detail of particulars, affirming the sufficiency of the complaint and the grounds of relief which it expresses.

This appeal is direct from the District Court and we encounter at the outset the question of our jurisdiction which is presented by a motion to dismiss the appeal. According to § 238 of the Judicial Code, appeal or error may be prosecuted from the District Court when their jurisdiction is in issue; in prize cases; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty is drawn in question; in

any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

It is manifest that the present case falls within none of the enumerated cases whether the regulations of the Associations be regarded as an exercise of the power which, it is contended, Congress alone possesses, or which has been conferred upon the Shipping Commission, or be regarded as violations of the Anti-Trust Law.

If, however, appellant received a justiciable injury from the regulations which the judgment of the District Court did not recognize, review of that action must be through the Circuit Court of Appeals for the Ninth Circuit and, therefore, in compliance with § 238(a) of the Judicial Code [1] (42 Stat. 837), the case must be transferred to that court.

So ordered.

CLALLAM COUNTY, WASHINGTON, ET AL. *v.* UNITED STATES AND UNITED STATES SPRUCE PRODUCTION CORPORATION.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 255. Argued November 15, 1923.—Decided November 26, 1923.

1. A suit by the United States and its corporate instrumentality against a county and its taxing officers, to avoid state and county taxation of property held by the corporation, upon the ground of

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[1] "If an appeal or writ of error has been or shall be taken to, or issued out of, any circuit court of appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court; or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a circuit court of appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, . . ."

its immunity under the Constitution, is a suit arising under the Constitution, and within the jurisdiction of the District Court. Jud. Code, § 24. P. 344.

2. A State cannot tax the property of a liquidating corporation which, though formed under her laws, was brought into existence and operated by the United States purely as an instrument of war, whose property was furnished, whose stock and bonds are held, and whose assets realized from the liquidation will be taken over, by the United States alone. P. 344. *Thomson* v. *Pacific Railroad*, 9 Wall. 579, distinguished.

QUESTIONS propounded by the Circuit Court of Appeals in a suit brought by the United States and the Spruce Production Corporation to set aside taxes on property held by the corporation. The plaintiffs got a decree in the District Court. 283 Fed. 645.

Mr. Thomas F. Trumbull and *Mr. John D. Fletcher*, with whom *Mr. Overton G. Ellis*, *Mr. Robert E. Evans*, *Mr. William B. Ritchie*, *Mr. F. L. Plummer*, *Mr. John M. Wilson* and *Mr. S. Warburton* were on the brief, for Clallam County et al.

Mr. Solicitor General Beck, with whom *Mr. George Ross Hull*, Special Assistant to the Attorney General, was on the brief, for the United States et al.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case comes here upon a certificate from the Circuit Court of Appeals. The suit was brought against the appellants, Clallam County, incorporated by the State of Washington, and its taxing officers, for a decree "cancelling", as it is put in the certificate, the taxes levied by the County and State for the years 1919, 1920 and 1921, upon land and other physical property to which the United States Spruce Production Corporation then had the legal title. 283 Fed. 645. The questions certified are (1) whether the District Court of the United States

had jurisdiction of this suit, and (2) whether the property held by the Spruce Production Corporation is subject to state taxation upon facts the statement of which may be abridged as follows.

The Act of July 9, 1918, c. 143, ch. xvi, § 1; 40 Stat. 845, 888, authorized the Director of Aircraft Production to form one or more corporations under the laws of any State for the purchase, production, manufacture and sale of aircraft, or equipment or materials therefor, and to own and operate railroads in connection therewith, whenever in his judgment it would facilitate the production of aircraft, &c., for the United States and Governments allied with it "in the prosecution of the present war." By § 3 within one year from the signing of a treaty of peace with Germany proceedings were to be begun for the dissolution of the corporation so formed. In August, 1918, this corporation was organized under the laws of Washington. The stock except seven shares for the trustees of the corporation was subscribed for by the United States and those shares were controlled by the United States and all property and dividends accruing from them were assigned to the United States. The United States conveyed to the corporation the lands and property now sought to be taxed and a partially performed contract under which these lands were to be acquired and a sawmill and logging railroad were to be built. The corporation issued bonds that were all taken by the United States for cash or in payment for the property conveyed to the company. It proceeded to complete the railroad and mill and to get materials for aircraft for the use of the United States in the war and its activities "were wholly directed to the government's program of production of aeroplane lumber." After the armistice these activities have been directed to liquidating the corporation's affairs, although to accomplish it some further contracts have been made, but, as we understand, solely for that end. The regulations of the Chief of Air

Service appointed under the National Defense Act provide for administrative supervision of the liquidation under the Secretary of War.

In short the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States and was used by it solely as means to that end, and when the war was over it stopped its work except so far as it found it necessary to go on in order to wind up its affairs. When the winding up is accomplished there will be a loss, but whatever assets may be realized will go to the United States. Upon these facts immunity is claimed from taxation by a State.

The immunity is claimed under the Constitution of the United States. It is true that no specific words forbid the tax, but the prohibition established by *McCulloch* v. *Maryland*, 4 Wheat. 316, was established on the ground that the power to tax assumed by the State was in its nature "repugnant to the constitutional laws of the Union" and therefore was one that under the Constitution the State could not use. 4 Wheat. 425, 426, 430. The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words. Therefore this suit arises under the Constitution and the District Court had jurisdiction of the case. Judicial Code, March 3, 1911, c. 231, § 24. The first question must be answered, Yes.

The State claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds, but that taxation of the property of the agent is not taxation of the means. We agree that it "is not always, or generally, taxation of the means," as said by Chief Justice Chase in *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 591. But it may be, and in our opinion clearly

is when as here not only the agent was created but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. It is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States. *Van Brocklin* v. *Tennessee,* 117 U. S. 151. It may be that if the United States saw fit to avail itself of machinery furnished by the State it would not escape the tax on that ground alone. But when we add the facts that we have recited we think it too plain for further argument that the tax could not be imposed. See *United States Spruce Production Corporation* v. *Lincoln County,* 285 Fed. 388; *United States* v. *Coghlan,* 261 Fed. 425; *King County* v. *United States Shipping Board Emergency Fleet Corporation,* 282 Fed. 950. We answer the second question, No.

Question 1. Answer, Yes.
Question 2. Answer, No.

BROSNAN, JR., ET AL. *v.* BROSNAN.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 56. Argued October 8, 1923.—Decided November 26, 1923.

In the District of Columbia, under a caveat to a will, whether filed before or after the will has been admitted to probate, the burden of proof on the issue whether the testator at the time of executing the will was of sound and disposing mind and capable of executing a valid deed or contract, is upon the caveator. P. 347.

QUESTION propounded by the Court of Appeals of the District of Columbia in a case coming to that court from the Supreme Court of the District.

Mr. Rudolph H. Yeatman and *Mr. Wilton J. Lambert*, with whom *Mr. Charles S. Baker* was on the briefs, for Brosnan, Jr., et al.

Mr. W. Gwynn Gardiner, with whom *Mr. Abner H. Ferguson* and *Mr. J. Wm. Tomlinson* were on the briefs, for Brosnan.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case comes before us, under § 251 of the Judicial Code, upon the following certificate:

"The Court of Appeals of the District of Columbia certifies that the record in this case discloses the following: Timothy Brosnan died in the District of Columbia, wherein he resided and was domiciled, on May 2, 1919, leaving a last Will and Testament dated July 29, 1918, which was duly filed for probate, whereupon his widow Margaret Brosnan, the appellee here, filed a caveat challenging the mental capacity of the decedent. At the close of the evidence, which was conflicting upon this point, the proponents of the Will, appellants here, prayed the court to instruct the jury that on this issue the burden of proof was upon the caveator. The court declined to so rule but instructed the jury, as requested by the caveator, that the burden of proof was upon the caveatees and that, if the jury should find 'that the evidence is evenly balanced or that the weight of the evidence is in favor of finding that the testator was of unsound mind,' the verdict should be against testamentary capacity. The Court of Appeals certifies that the following question of law arises upon the record, the decision of which is

necessary for the proper disposition of the case, and, to the end that a correct result may be reached, desires the instruction of the Supreme Court of the United States upon that question, to wit: upon the issue whether the testator, at the time of the execution of the Will, was 'of sound and disposing mind and capable of executing a valid deed or contract,' is the burden of proof in the District of Columbia upon the caveator or caveatee?"

The Code of the District of Columbia provides for the probate of a will in solemn form upon the filing of a petition and notice to all persons interested in the estate by service of citation or publication (§ 130); permits any party in interest to file a caveat in opposition to its probate upon or prior to the hearing (§ 136); and, if the will be admitted to probate, permits any person in interest, within a specified time thereafter, to file a caveat and pray that the probate be revoked (§ 137). It is further provided that no will shall be good and effectual unless the person making the same be at the time of its execution of sound and disposing mind and capable of executing a valid deed or contract (§ 1625).

The certificate of the Court of Appeals does not show specifically whether the caveat was filed before or after the probate of the will; but for the purpose of giving the instruction requested as to the rule of law in the District of Columbia, this is immaterial, whatever may be the effect of the distinction elsewhere.

The questions as to the burden of proof under a caveat challenging the mental capacity of the testator, before or after the probate of a will, have given rise to much conflict of opinion in different jurisdictions. It is, however unnecessary to enter into a consideration of these questions at large, for the reason that the law in the District of Columbia has been established by the decision

of this Court in *Leach* v. *Burr,* 188 U. S. 510, 516 (1903). In that case the will having been offered for probate, a caveat was filed in opposition. The questions submitted for consideration on the trial in the Supreme Court of the District were whether the testator was at the time of executing the will "of sound mind, capable of executing a valid deed or contract," and whether the will was procured by threats, menace, and duress, or by fraud. The trial court directed a verdict against the caveator and ordered the will to be admitted to probate. Upon appeal from an affirmance of this order by the Court of Appeals, this Court, after specifically setting out the questions submitted for consideration and reviewing the evidence, especially in reference to the question of the mental capacity of the testator, said: "Upon questions of this kind submitted to a jury the burden of proof, in this District at least, is on the caveators. *Dunlop* v. *Peter,* 1 Cranch C. C. 403. See also *Higgins* v. *Carlton,* 28 Maryland, 115, 143; *Tyson* v. *Tyson's Executors,* 37 Maryland, 567. The caveators in the present case failed to sustain this burden, and we are of the opinion that the trial court did not err in directing a verdict against them. The judgment is affirmed." [1]

This is a specific decision that in the District of Columbia under a caveat filed in opposition to the probate of a will the burden of proof on an issue as to the mental capacity of the testator, is upon the caveator. It definitely determines the rule of law in the District and completely abrogates such effect, if any, as otherwise might have attached to the incidental remark in the previous case of *Rich* v. *Lemmon,* 15 App. D. C. 507

[1] In the *Higgins Case* it specifically appears that the caveat was filed before probate of the will; in the *Dunlop Case* this inferentially appears; and in the *Tyson Case* it appears that the caveat was filed after the will had been admitted to probate.

(1899), that the "onus of proof" upon such issue was on the proponent of the will.[2]

Apart from any question of pleading as to the burden of allegation, this rule as to the burden of proof rests upon the ancient presumption in reference to sanity. *Higgins* v. *Carlton, supra,* p. 141. And viewed from a practical rather than an academic standpoint, it gives effective weight to the presumption of the testator's sanity and obviates the difficulty which would arise if such presumption were treated as one which merely established a *prima facie* case in favor of the proponent of the will but did not relieve him from the ultimate burden of persuasion on the question of the testator's mental capacity, involving a nice distinction tending to confusion in a jury trial. And for this reason, as well as upon the principle of *stare decisis,* we have no disposition to modify or change the law of the District as settled in *Leach* v. *Burr.*

And obviously, as the caveator under that law has the burden of proving the want of mental capacity in the testator before the will has been probated, he is not relieved of this burden when challenging such capacity in a proceeding instituted to revoke the probate of a will after the presumption of the testator's sanity has been fortified by a decree of probate made in solemn form after notice to the parties in interest.

For the foregoing reasons, in answer to the request of the Court of Appeals, it is instructed: That in the District of Columbia, under a caveat to a will challenging the mental capacity of the testator, whether before or after the will has been admitted to probate, the burden of proof

[2] The rule stated in *Leach* v. *Burr* seems at first to have been followed, as it should, by the trial courts of the District, as settled law. See, for example, *Re Will of Shelley,* 34 Wash. L. Rep. 801 (1906). But later they seem to have regarded the earlier statement in *Rich* v. *Lemmon,* as controlling. See *Re Estate of Robinson,* 45 Wash. L. Rep. 760 (1917).

on the issue whether the testator at the time of executing the will was of sound and disposing mind and capable of executing a valid deed or contract, is upon the caveator.

COMMONWEALTH OF PENNSYLVANIA *v.* STATE OF WEST VIRGINIA.

STATE OF OHIO *v.* STATE OF WEST VIRGINIA.

ON REHEARING.

Nos. 15 and 16, Orig., October Term, 1922. Reargued November 20, 1923.—Decided December 3, 1923.

Decree heretofore made in these cases, reaffirmed, after rehearing.

Mr. John W. Davis and *Mr. George E. Alter*, Attorney General of the Commonwealth of Pennsylvania, for plaintiffs.

Mr. Philip P. Steptoe and *Mr. George M. Hoffheimer* for defendant.

Mr. Justice Van Devanter announced the ruling of the Court.

An opinion expressing the views of the Court in these cases was announced at the last term and a decree was entered then. 262 U. S. 553, 623. By the Court's leave, given at that term, a petition for rehearing was filed. The cases had been presented in oral argument three times, but three members of the Court had heard only the last presentation. This, with the importance of the questions involved and the public character of the litigants, led the Court to grant the rehearing. It was had two weeks ago. The cases have been considered again in the light of that presentation, and after this further reflection the Court perceives no ground for disturbing the

opinion heretofore announced or the decree entered thereon.

Decree reaffirmed.

The CHIEF JUSTICE did not participate in the consideration of the cases on the rehearing.

MR. JUSTICE HOLMES, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS dissent, for the reasons given in their dissenting opinions at the last term.

HIGHTOWER ET AL. *v.* AMERICAN NATIONAL BANK OF MACON, GEORGIA.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 25. Argued January 25, 1923.—Decided December 3, 1923.

1. A contract between two national banks under which the assets of the one were transferred to the other and the latter assumed the liabilities of the former and advanced money, in excess of the assets, to pay the liabilities and expenses, *construed* as intending, not a sale, but a pledge of the assets, as security for repayment of the money advanced. Pp. 353, 358.
2. Where a national bank, in financial difficulty, but still in active operation and not thought to be insolvent, to protect the interests of its creditors and shareholders made a contract by authority of its directors with another national bank, whereby the second bank assumed the liabilities of the first, took over its assets as security, and paid the debts by means of the assets and its own funds, acting finally as liquidating agent after the shareholders of the first bank had ratified the contract and ordered liquidation under Rev. Stats., § 5220,—*held*, that the contract was valid; and that the claim of the second bank for money advanced in excess of the assets was not created during the liquidation but was a debt arising under the contract for which the shareholders of the liquidated bank were liable under Rev. Stats., § 5151, as amended. P. 360.

276 Fed. 371, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court awarding

recoveries to the appellee bank, as plaintiff, in its suit to enforce the liabilities of the defendants (here appellants) as shareholders of another national bank.

Mr. John E. Hall, with whom *Mr. Charles L. Bartlett, Mr. Charles Akerman, Mr. Richard C. Jordan, Mr. Thomas E. Ryals, Mr. Robert L. Anderson, Mr. Warren Grice, Mr. Charles J. Bloch* and *Mr. A. O. B. Sparks* were on the brief, for appellants.

Mr. Orville A. Park, with whom *Mr. George S. Jones* was on the brief, for appellee.

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit in equity, in the nature of a creditor's bill, against a national bank and its shareholders to enforce the liability of the shareholders for the bank's debts. The plaintiff is another national bank and sues on behalf of all creditors, although insisting it is the only one. The District Court dismissed the bill as not stating a cause of action, 246 Fed. 721, and 248 Fed. 187; but the Circuit Court of Appeals thought the bill good and reversed that decree. 254 Fed. 249. The defendants answered; the evidence was taken before a master and reported with advisory findings, and a decree was entered by the District Court establishing the plaintiff's claim as a debt—the only unsettled obligation—of the defendant bank, and awarding recoveries from the several shareholders in sums conforming to their holdings. That decree was affirmed by the Circuit Court of Appeals, 276 Fed. 371, and the defendants appealed to this Court.

The record is a large one and shows that the parties brought out everything of an evidential character bearing on the issues. On all questions of fact the master and the two courts below were in full accord, and there was ample evidence to sustain their findings.

Both banks were located at Macon, Georgia, the plaintiff being known as the American National and the other as the Commercial National. In the summer of 1914 they entered into a contract looking to a winding up of the affairs of the Commercial National, and providing for a transfer of its assets to the American National and the assumption and payment of its liabilities by the latter. When the suit was brought all that was to be done under the contract was practically completed, save that the obligation, if there was such, to reimburse the American National for advancing moneys to pay the Commercial National's liabilities had not been fulfilled.

The questions presented to us for decision turn largely on the construction and legal effect of the contract and are, first, whether the transfer of the Commercial National's assets was made by way of an outright sale, or by way of giving security for the repayment of the moneys advanced by the American National under the contract, and, secondly, if repayment was required, whether that is a debt or engagement for which the Commercial National's shareholders are liable.

The statutes in connection with which the contract and these questions must be examined are as follows:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stats., § 5151; Act December 23, 1913, c. 6, § 23, 38 Stat. 273.

"Any [national banking] association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." Rev. Stats., § 5220.

"When any national banking association shall have gone into liquidation under the provisions of section five

thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes, may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill," etc. Act June 30, 1876, c. 156, § 2, 19 Stat. 63.

The contract was made in pursuance of resolutions passed by the directors of both banks, and was ratified and approved by a resolution of the Commercial National's shareholders. These resolutions and the contract are all set forth at length in the opinion of the Circuit Court of Appeals delivered on the first appeal to that court, 254 Fed. 249, and need not be reproduced here.

The primary purpose in what was done was to relieve the Commercial National from an existing embarrassment, to conserve its assets and to subserve the interests of its creditors and stockholders. That bank, although having assets thought at the time to be in excess of its liabilities, was in need of very substantial assistance. It had made excessive and improvident loans, had borrowed beyond an admissible limit, had permitted its available cash to fall below a reasonable minimum, had been criticised by the Comptroller for these departures, had become the subject of disturbing rumors and was not in condition to withstand a run by depositors. It had sought assistance from the American National, and the latter had manifested a disposition to help within prudent limits. Various courses had been informally suggested without receiving definite approval, among them being a voluntary liquidation of the Commercial National under the statute before cited, a consolidation of the two banks, an outright sale of the Commercial National's assets to the American National at an agreed or fixed valuation, and a transfer of the assets, or a large part of them, to the American National as collateral to secure repayment to it of moneys to be advanced by it to meet the Com-

mercial National's needs. All of these proceeded on the theory that the depositors and other creditors of that bank should be paid as and when payment was demanded; that money in large amounts would be required for the purpose, and that the money should be provided or obtained in a way which would permit an orderly and advantageous realization on the Commercial National's assets and not involve any sacrifice of their real value.

The resolution of the directors of the Commercial National, as also that of the directors of the American National, was passed August 1, 1914; the contract was signed August 11, and the ratifying resolution of the Commercial National's shareholders was passed September 30.

The resolution of the Commercial National's directors left the questions of voluntary liquidation and consolidation to the consideration and action of the shareholders, but expressly authorized the bank's officers to transfer all of its assets to the American National "as cash" (meaning at an agreed or fixed cash valuation) or "as collateral" to secure that bank for moneys "advanced" to pay liabilities of the Commercial National, "the details" being committed "to the discretion" of such officers and they being empowered to enter into any necessary or appropriate contract. The resolution of the American National's directors said nothing about consolidation and only incidentally referred to voluntary liquidation, but expressly assented to the assumption and payment by that bank of the liabilities of the Commercial National "upon condition" that the latter transfer to the American National "as cash or collateral" sufficient assets to afford it full and satisfactory protection. This resolution, like the other, committed the adjustment of details to the discretion of the bank's officers.

Immediately following the adoption of these directors' resolutions the Commercial National's assets were deliv-

ered into the custody or keeping of the American National, but were not delivered "as cash" or at an agreed or fixed valuation. Thereupon, and on the faith of such delivery, the American National began advancing moneys with which to pay depositors and other creditors of the Commercial National.

The contract, signed ten days later, recites the substance of the directors' resolutions, but refers to them as authorizing a transfer of the assets "as security", instead of "as cash or security." It further recites that "the assets of the Commercial National have been delivered to the American National" and then in six numbered paragraphs proceeds to state the terms and details of the engagement. The first paragraph purports to transfer all the assets in present terms, contains no qualifying words, and, when taken alone, appears to pass the title absolutely and without reservation. The second and third paragraphs declare that the officers and directors of the Commercial National will call a meeting of its shareholders and procure from them resolutions (a) providing for the liquidation of that bank under the statute, (b) authorizing the consolidation of the two banks "by the purchase of the assets of the Commercial National by the American National," but without the issue of stock in the latter to the shareholders of the former, (c) ratifying and confirming the action of the Commercial National's directors before recited and "this contract," and (d) designating the American National as liquidating agent to conduct the liquidation of the Commercial National according to the statute and under the supervision of the Commercial National's directors. The fourth paragraph provides that the Commercial National shall maintain its corporate existence until the completion of its liquidation. The fifth paragraph declares without qualification that the American National assumes and promises to pay, as and when payment is demanded, all

the liabilities of the Commercial National, including the redemption of its circulating notes. The sixth paragraph, which obviously is explanatory of some of the others, particularly of the first and fifth, reads as follows:

"VI. That said American National Bank will accept the appointment as liquidating agent of said Commercial National Bank, and will proceed with all due and reasonable diligence to liquidate said association and to collect and reduce to cash all the assets of said association, all of said assets to be held as security by said American National Bank for all advances made by it in paying the depositors and other liabilities of said Commercial National Bank and the actual expenses incurred by said American National Bank in realizing on said assets; and that after deducting from the proceeds of said assets the actual expenses incurred by said American National Bank in liquidating said association and acting as liquidating agent and in collecting said assets and realizing upon the same, it will apply said proceeds, first, in repaying to itself all amounts advanced by it hereunder, with interest thereon at the rate of seven (7%) per cent. per annum; next, in discharging the liabilities of said Commercial National Bank which shall not have been paid by advances made by said American National Bank; and that when all of said liabilities have been fully discharged it will account to the shareholders of said Commercial National Bank and from time to time pay over to said shareholders pro rata the surplus remaining in its hands from the proceeds of said assets; said American National Bank to act as such liquidating agent without compensation for its own services.

"It being distinctly agreed and understood that in the event the said liquidation should be interrupted or discontinued for any reason beyond the control of said American National Bank, then and in that event said American National Bank shall and does hold all of the

assets of said Commercial National Bank as security for the advances which may have been made by it, up to the time such liquidation may be so discontinued.

"And it being further distinctly agreed and understood that neither the resolutions of said boards of directors of said associations nor this contract shall relieve the shareholders of the Commercial National Bank from their legal liability as shareholders to respond, in the event it may be necessary to have recourse upon such shareholders' liability, for any deficit which may remain after exhausting the other assets of said association in the payment of its liabilities."

The appellants lay some emphasis on what is said in the second and third paragraphs about procuring from the shareholders a resolution authorizing a consolidation of the two banks by one purchasing the assets of the other. But we think it is of no importance here. In itself it could have no force save as a solicitation of action by the shareholders. They did not respond to it. No such resolution was adopted, and the tentative proposal failed. The reason is apparent. The shareholders' meeting was had fifty days after the contract was signed. In the meantime the Commercial National's affairs had been subjected to close examination and found to be such that a consolidation was not at all feasible. At that meeting, however, the shareholders did, by a vote representing two-thirds of all the shares, ratify and confirm the contract, put the bank into voluntary liquidation under the statute, designate the American National as liquidating agent and appoint a committee of five shareholders to advise with and assist the liquidating agent and directors throughout the course of the liquidation.

The chief contention of the appellants is that the transaction between the two banks was not a pledging or hypothecation of the assets as security for the repayment of advances to pay liabilities, but an outright sale of the

assets in consideration of an unqualified assumption of the liabilities. We agree with the Circuit Court of Appeals in thinking the assets were not sold but pledged as security.

It is quite true that the first and fifth paragraphs of the contract, if separated from the others, make for the view that the transfer of assets and the assumption of liabilities were without qualification or reservation,—each as the full consideration for the other. But the contract consists of much more than those paragraphs and must be examined as a whole to determine the nature of the transaction of which it is a memorial. In the sixth paragraph the parties definitely explain the purpose with which the assets were transferred and the nature of the engagement by which payment of the liabilities was assumed. That paragraph cannot be disregarded. To do so would be much like determining the nature and effect of a mortgage deed without considering the defeasance clause. The paragraph shows that the American National was to hold the assets "as security" for "all advances" made by it to pay liabilities and expenses; that it was to reduce the assets to cash with reasonable diligence and apply the proceeds in "repaying" "all amounts advanced" by it "with interest" added, and that if, for any reason beyond its control, the liquidation should be discontinued, it should hold the assets "as security" for its "advances" up to that time. The paragraph also recognizes that in the end there might be either a surplus or deficiency of proceeds from the assets, and deals with both contingencies,—with a possible surplus by directing that the same be paid to the Commercial National's shareholders pro rata, and with a possible deficiency by declaring that neither the directors' resolutions nor the contract "shall relieve the shareholders" from their "legal liability as shareholders to respond." The rational and necessary conclusion from these provisions is that the

moneys advanced were loaned and were to be repaid with interest, that the assets were transferred as security for such repayment and that the resulting relations between the banks were those of debtor and creditor and pledgor and pledgee.

The Circuit Court of Appeals fortified its conclusion in this regard by showing that throughout the period in which the contract was in process of execution the officers of the two banks, their directors and the shareholders' committee of the Commercial National put a like construction on it. We agree that this is so, but extended comment on that course of action would serve no purpose, because, in our opinion, the contract as a whole does not admit of any other construction.

The remaining contention is that the debt sought to be enforced was created during the process of liquidation, and therefore is not one for which the shareholders are liable. The premise is faulty. The debt arose from the contract and represents moneys advanced in excess of what was realized from the assets. When the contract was made the bank was in active operation, and it remained so for a short period thereafter. It was cashing checks, receiving deposits, clearing checks through the clearing house, checking on its deposits in other banks and otherwise conducting a banking business. True, its business was conducted in quarters assigned to it in the banking house of the American National, but it was acting through its own officers, tellers and employees. It had not been pronounced insolvent, nor was it then thought to be so. The process of liquidation under the statute began fifty days after the contract was made. There was power to make the contract. The purpose was not to obtain money to engage in new business, but simply to change from many creditors to one. Nor was the contract made in derogation of the rights of the shareholders. One of its purposes was to subserve their interests, and this

was recognized when they ratified and confirmed it. Under prior decisions the contention must fail. *Wyman* v. *Wallace,* 201 U. S. 230; *Poppleton* v. *Wallace,* 201 U. S. 245.

The amount of the debt is not questioned.

Decree affirmed.

KING COUNTY, WASHINGTON, v. SEATTLE SCHOOL DISTRICT NO. 1.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 30. Argued April 13, 1923.—Decided December 3, 1923.

1. A suit is within the jurisdiction of the District Court as a controversy arising under the laws of the United States, Jud. Code, § 24, where the right and title set up by the plaintiff depend upon the construction of an act of Congress. P. 363.
2. The Act of Congress of May 23, 1908, directing that 25% of all money received from each forest reserve shall be paid to the State in which the reserve is situated, "to be expended as the State . . . legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated," does not create a trust, but results in a sacred obligation imposed on the public faith of the donee State. P. 364.
3. The act does not prescribe how the moneys shall be divided as between the two purposes named, but leaves this to the State. *Id.*
4. Where a state law authorizes and directs county commissioners to expend the moneys received by their county, under the above act of Congress, for the benefit of the public schools and public roads thereof, a school district has no standing to call a county to account when more of the funds are used for the one than for the other purpose, since equal division between the two is not contemplated or required by the act, and the rule that a grant to several, without specification of interests, conveys equal interests, does not apply. P. 365.

278 Fed. 46, reversed.

APPEAL from a decision of the Circuit Court of Appeals which affirmed a decree of the District Court in favor of

the School District in its suit against the County for an accounting.

Mr. Howard A. Hanson, with whom *Mr. Malcolm Douglas* was on the briefs, for appellant.

Mr. Henry W. Pennock, with whom *Mr. Dallas V. Halverstadt* was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

The Act of Congress of May 23, 1908, c. 192, 35 Stat. 260,[1] directs that twenty-five per cent. of all money received from each forest reserve during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the reserve is situated "to be expended as the State . . . legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated;" and it is provided that when any forest reserve is in more than one State or Territory or county the distributive share to each from the proceeds of said reserve shall be proportional to its area therein. A statute of Washington (Laws of 1907, c. 185, p. 406) directs the state treasurer to turn over to the county treasurers the amounts of such money belonging to the respective counties; and provides that "county commissioners of the respective counties to which the money is distributed are hereby authorized and directed to expend said money for the benefit of the public schools and public roads thereof, and not otherwise."

The Secretary of the Treasury paid over to the State the proper amounts for the years from 1908 to 1918, inclusive. A part of the Snoqualmie Forest Reserve is in King County, and the proportionate amounts for these

[1] See Act of March 4, 1907, c. 2907, 34 Stat. 1270.

years, aggregating $20,106.07, were turned over by the State to the county treasurer. For each of the years, 1908, 1916, 1917, and 1918, the county commissioners directed that one-half of the amount be apportioned to the county school fund and one-half to the road and bridge fund; and for each of the years from 1909 to 1915, inclusive, directed that all be assigned to the road and bridge fund. The county treasurer made the distributions as directed. Out of the total amount above mentioned, there was assigned $18,481.43 to the road and bridge fund and $1,624.64 to the county school fund. The latter is $8,428.40 less than one-half the total received by the county. The appellee is one of the school districts of the county and claims to be entitled to such proportion of one-half the amount received in each year by the county as the annual school attendance in the district bore to the total attendance in all the districts of the county. The amounts so claimed make a total of $6,789.22.

This suit was brought by the appellee, Seattle School District No. 1, to have King County and its treasurer declared to be trustees, to require them to account, and to recover the sum so claimed. The complaint set forth the facts substantially as above stated. The county moved to dismiss on the grounds that the court was without jurisdiction and that the complaint failed to state a cause of action. The motion was denied, and, the appellant declining to plead further, a decree was entered in favor of the appellee as prayed; this was affirmed by the Circuit Court of Appeals.

Section 24 of the Judicial Code provides that the district courts shall have original jurisdiction where the matter in controversy arises under the laws of the United States. In this case the right and title set up by the appellee depends upon the act of Congress. There is involved the question whether that act permits the money so received by the county to be expended by the county

commissioners as directed by state legislation, or requires an equal distribution annually for the benefit of public schools and public roads of the county. Appellee contended for the latter construction, and the courts below sustained its claim. If this is not a correct construction of the act appellee has no cause of action. See *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526, 528; *Shulthis* v. *McDougal*, 225 U. S. 561, 569. The District Court had jurisdiction.

When turned over to the State, the money belongs to it absolutely. There is no limitation upon the power of the legislature to prescribe how the expenditures shall be made for the purposes stated, though, by the act of Congress, "there is a sacred obligation imposed on its public faith." *Cooper* v. *Roberts*, 18 How. 173, 182; *Alabama* v. *Schmidt*, 232 U. S. 168, 173; *Mills County* v. *Railroad Companies*, 107 U. S. 557, 566; *Hagar* v. *Reclamation District*, 111 U. S. 701, 713. No trust for the benefit of appellee is created by the grant. But, assuming the moneys paid over to the State are charged with a trust that there shall be expended annually one-half for schools and one-half for roads, the appellee has no right to enforce the trust. Congress alone can inquire into the manner of its execution by the State. *United States* v. *Louisiana*, 127 U. S. 182, 185–192; *Mills County* v. *Railroad Companies, supra; Emigrant Co.* v. *County of Adams*, 100 U. S. 61, 69; *Barrett* v. *Brooks*, 21 Ia. 144, 148. See also *Stearns* v. *Minnesota*, 179 U. S. 223, 231. The act does not direct any division of the money between schools and roads. Its language above quoted indicates an intention on the part of Congress that the State in its discretion may prescribe by legislation how the money is to be expended. No distribution to the appellee or any other school district is required. The public schools and public roads are provided and maintained by the State or its subdivisions, and the moneys granted by

the United States are assets in the hands of the State to be used for the specified purposes as it deems best. See *State* v. *Callvert,* 34 Wash. 58, 61.

The rule that, where a grant to two or more persons does not state the interest of each, their estates are presumed to be equal,[2] does not apply. Under the act of Congress, it was competent for the legislature of Washington to authorize county commissioners to expend the money for public schools and public roads. Equal division annually between the two purposes is not required or contemplated by the act. The appellee has no standing to object to the distributions made by the county commissioners.

The decree appealed from is reversed.

STATE OF NORTH DAKOTA *v.* STATE OF MINNESOTA.

IN EQUITY.

No. 10, Original. Argued January 3, 4, 1921; restored to docket and ordered that supplemental proofs be taken, April 18, 1921; Argued March 12, 13, 1923.—Decided December 10, 1923.

1. Where a State, by changing the method of draining surface water from lands within her border, increases the flow of an interstate stream greatly beyond its natural capacity, so that the water is thrown upon farms in another State, the latter State has such an interest, as quasi-sovereign, in the comfort, health and prosperity of her farm-owners that resort may be had by her to the original jurisdiction of this Court, for relief by injunction, against the State causing the injury. P. 372.
2. In a suit of that character, the burden upon the plaintiff State of sustaining her allegations is much greater than that imposed upon the plaintiff in an ordinary suit between private parties. P. 374.

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[2] *Loring* v. *Palmer,* 118 U. S. 321, 341; *Lee* v. *Wysong,* 128 Fed. 833, 838; *Keuper* v. *Mette,* 239 Ill. 586, 592; *Campau* v. *Campau,* 44 Mich. 31, 34; *Hill* v. *Reiner,* 167 Mich. 400, 402.

3. In view of the Eleventh Amendment, a claim for money damages, made by a State on behalf of her individual citizens, against another State, is beyond the original jurisdiction of this Court. P. 374.
4. The evidence in this case shows that floods in the Bois de Sioux River, resulting in inundations of riparian farm lands in North Dakota, were caused by excessive rainfalls during a series of years, rather than by drainage operations conducted by Minnesota, and fails to sustain the peculiar burden resting on North Dakota to prove her allegations to the contrary. Pp. 376, 386.

Bill dismissed without prejudice.

THIS was a suit brought originally in this Court by the State of North Dakota to enjoin the State of Minnesota from continuing to use a system of drainage ditches constructed by the latter State, and for money compensation for damage to North Dakota farmers caused by overflows of the Bois de Sioux River, attributed by the plaintiff to the construction and operation of the ditches. The plaintiff also sought damages for destruction of public roads, bridges, etc., caused by the overflows. See also 256 U. S. 220. In the following summaries of argument no attempt is made to incorporate discussion of the facts.

Mr. H. M. Bqutelle, with whom *Mr. William Langer,* Attorney General of the State of North Dakota, *Mr. John Lind* and *Mr. I. C. Pinkney* were on the briefs, for complainant.[1]

The right to maintain this suit is established by *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230; *Kansas* v. *Colorado,* 185 U. S. 125; *Missouri* v. *Illinois,* 180 U. S. 208; *In re Debs,* 158 U. S. 564.

The citizen is remediless, unless redress of his wrongs may be invoked by his State.

The rules established by the common law are applicable in controversies between States. *Kansas* v. *Colorado,*

[1] *Mr. Sveinbjorn Johnson,* Attorney General of the State of North Dakota, was also on the briefs filed upon the second argument.

supra; s. c. 206 U. S. 46; *Western Union Tel. Co.* v. *Call Pub. Co.,* 181 U. S. 92.

The doctrine of state equality is inconsistent with the contention of Minnesota in this case, which presupposes that that State may adopt such measures as it sees fit for the improvement of its domain and the welfare of its citizens, regardless of the consequences to neighboring commonwealths or their citizens. *Kansas* v. *Colorado, supra; Sylvester* v. *Washington,* 215 U. S. 80; *Rickey Land Co.* v. *Miller & Lux,* 218 U. S. 258; *Bean* v. *Morris,* 221 U. S. 485; *Marshall Dental Mfg. Co.* v. *Iowa,* 226 U. S. 460.

Minnesota has no legal right to appropriate or use international watercourses in any manner unreasonably taxing their capacity, to the injury of others whose rights therein are coequal with her own. *Kansas* v. *Colorado, supra; Atchison* v. *Peterson,* 20 Wall. 507; *Howard* v. *Ingersoll,* 13 How. 381; *Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9; *United States* v. *Rio Grande Co.,* 174 U. S. 690.

The case of the complainant may be broadly rested on those rights which are the natural incidents of its proprietary status, as owner of lands bordering a natural watercourse, and, equally on the right to preserve the natural conditions of the stream.

On the extent to which a natural watercourse may be employed by an upper proprietor for his own purposes, see: II Farnum, Waters & Water Rights, § 186; *Jackman* v. *Arlington Mills,* 137 Mass. 277; *Noonan* v. *Albany,* 79 N. Y. 470; *McCormick* v. *Horan,* 81 N. Y. 86; *Walshe* v. *Dwight Mfg. Co.,* 178 Ala. 310; *O'Brien* v. *St. Paul,* 18 Minn. 182; *Baldwin* v. *Ohio Township,* 70 Kans. 102; *Gibbs* v. *Williams,* 25 Kans. 214; *Walker* v. *New Mexico Ry.,* 165 U. S. 593; *Grant* v. *Kuglar,* 81 Ala. 637; *Tillotson* v. *Smith,* 32 N. H. 90; *Mayor* v. *Appold,* 42 Md. 442; *Hyatt* v. *Albro,* 121 Mich. 638; *Oregon Iron Co.* v. *Trullenger,* 3 Ore. 1; *McKee* v. *Delaware Canal Co.,* 125 N. Y. 353.

While the decisions of Minnesota are in no wise controlling in the present controversy, it may be observed that the courts of that State have been on both sides of the proposition involved, starting with full recognition of the common law principles, and ending by repudiating the common law for a peculiar doctrine. See *O'Brien* v. *St. Paul*, 18 Minn. 182; *Hogenson* v. *St. Paul, etc. Ry.*, 31 Minn. 224; *Olson* v. *St. Paul, etc. Ry.*, 38 Minn. 419; *Jordan* v. *St. Paul, etc. Ry.*, 42 Minn. 172; *Rowe* v. *St. Paul, etc. Ry.*, 41 Minn. 384; *Sheehan* v. *Flynn*, 59 Minn. 436; *Gilfillan* v. *Schmidt*, 64 Minn. 29; *Wickstrom* v. *Board of County Commrs.*, 98 Minn. 89; *Erhardt* v. *Wagner*, 104 Minn. 258; *Hartle* v. *Neighbauer*, 142 Minn. 438.

Complainant is entitled to an injunction restraining the further continuance of the trespass. *Cruikshank* v. *Bidwell*, 176 U. S. 73; *Smyth* v. *Ames*, 169 U. S. 466; *Franklin Tel. Co.* v. *Harrison*, 145 U. S. 459; *Watson* v. *Sutherland*, 5 Wall. 74; *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1.

The jurisdiction in equity, having attached, will be retained to administer all relief which the nature of the case demands as necessary to a final determination of all matters in issue. *United States* v. *Union Pac. Ry. Co.*, 160 U. S. 1; I Pomeroy, Eq. Jur., 3d ed., § 181; *Lynch* v. *Metropolitan, etc. Ry. Co.*, 129 N. Y. 274.

Complainant is entitled to the restoration of the natural conditions.

That complainant is entitled to a decree for damages has been sufficiently indicated in the authorities already cited; though the principle on which these damages are to be ascertained, in a case of this character, is not free from difficulty.

While the measure of damages adopted in private cases may appear both unreasonable and inadequate for determining the redress to which a State is entitled for trespass

on its domain, there is no other known rule to which recourse may be had. It is necessarily assumed that the general theory of compensatory damage will be applied. But the complainant does not concede either the propriety or reasonableness of this rule. Its technical limitations would not be regarded as controlling diplomatic negotiations.

The local rules prevailing in the States involved, are not controlling.

In addition to the damages to farm-owners, there is the matter of the public damage in the destruction of roads, bridges, culverts and miscellaneous improvements in the flooded area aggregating $7,280. Also a negligible item of loss of taxes by abatement, which needs not be considered.

Mr. John E. Palmer and *Mr. Egbert S. Oakley,* Assistant Attorney General, with whom *Mr. Clifford L. Hilton,* Attorney General, of the State of Minnesota, and *Mr. Montreville J. Brown,* Assistant Attorney General, were on the briefs, for defendant.[1]

The Eleventh Amendment withdrew from the judicial power of the United States every suit at law or in equity commenced or prosecuted against one of the United States by a citizen of another State, and prohibits this Court from exercising jurisdiction of a cause in which one State seeks relief against another State on behalf of its citizens in a matter in which the State prosecuting has no interest of its own. *New Hampshire* v. *Louisiana,* and *New York* v. *Louisiana,* 108 U. S. 76; *Louisiana* v. *Texas,* 176 U. S. 1.

The rule laid down in these cases is applicable to the case before us, in so far as the recovery of damages is concerned. In that aspect, it is a suit by these landowners, and the State is simply lending the use of its

[1] Upon the second hearing, the case was argued by *Mr. Brown* on behalf of the defendant.

name. This rule was in no way modified by *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; *Missouri* v. *Illinois*, 180 U. S. 208; and *Kansas* v. *Colorado*, 185 U. S. 125.

North Dakota is not entitled to equitable relief.

If the common law rule is applicable, we contend that Minnesota has a right to rid its lands of surface water even though in so doing injury may result to the lands of a neighboring State. The gist of the rule is that no legal right of any kind can be claimed *jure naturae* in the flow of surface water, so that neither its detention, diversion nor repulsion is an actionable injury, even though damage ensue. *Walker* v. *New Mexico, etc., Ry. Co.*, 165 U. S. 593; *Bowlsby* v. *Speer*, 31 N. J. L. 351; *Baltzeger* v. *Carolina Midland R. R. Co.*, 54 S. Car. 242; *Hoyt* v. *Hudson*, 27 Wis. 656. Minnesota relieves its lands of the common enemy—surface water—and, if it is cast upon the lands of complainant, it is for complainant to get rid of it as best it can.

Under the decisions of North Dakota, surface water may be cast into a natural water course or drain-way, even though by so doing the flow is so accelerated as to cause the flooding of lands lower down; and the owner of such lands has no right of action. *Soules* v. *Northern Pacific Ry. Co.*, 34 N. D. 7; *McHenry County* v. *Brady*, 37 N. D. 59.

North Dakota in adopting this rule seems to have followed the courts of other jurisdictions. *Williams* v. *Gale*, (Md.) 3 H. & J. 231; *Miller* v. *Laubach*, 47 Pa. St. 154; *Foot* v. *Bronson*, 4 Lans. 47; *Fenton & Thompson R. R. Co.* v. *Adams*, 221 Ill. 201.

Complainant is in no position to object to the application of the rule which its court has adopted for the determination of disputes between its citizens and between its citizens and municipalities and the citizens and municipalities of a foreign State. In *Kansas* v. *Colorado, supra*, this Court applied the rule of law which had been adopted

by the supreme court of the complaining State. We submit that the same course might properly be followed in the case at bar.

The common law as to surface water is in force in Minnesota, except that it is modified to the extent that one must so use his own as not unnecessarily or unreasonably to injure his neighbor. Under this rule it is the duty of an owner draining his land to deposit surface water in some natural drain if one is reasonably accessible, and he may do so even though it is thereby conveyed upon the land of his neighbor, if he does not unreasonably injure him. A circumstance which the Minnesota court considers in determining what is a reasonable use of one's own land under this rule is the amount of benefit to his land, as compared with the amount of injury to his neighbor's land, by reason of casting the burden of the surface water upon it. *Sheehan* v. *Flynn,* 59 Minn. 436; *Gilfillan* v. *Schmidt,* 64 Minn. 29; *Hartle* v. *Neighbauer,* 142 Minn. 438.

It cannot be successfully contended that Minnesota has violated its own rule in draining surface water by means of its system of ditches, although the lands of North Dakota are subjected to injury as claimed.

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a bill in equity exhibited by the State of North Dakota against the State of Minnesota. The bill avers that the latter State has, by constructing cut-off ditches and straightening the Mustinka River, increased the speed and volume of its flow into Lake Traverse, and thereby raised the level of the Lake, causing its outlet, the Bois de Sioux River, to overflow and greatly to injure a valuable farming area in North Dakota lying on the west bank of that stream. The damage to the complainant in destruction of roads and bridges is alleged to be $5,000, and the

damage to owners of the farms in destruction of crops and injury to the arable quality of their land, to be more than a million dollars. A further allegation is that the ditch is likely at every period of high water to cause overflows as injurious as those complained of. The prayer is for an order enjoining the continued use of the ditches and a decree against the State of Minnesota for the damages sustained by the complainant State and its farmers. Minnesota in her answer admits the construction of the ditches for drainage and sanitation, but denies that they caused the overflow complained of, and avers that the flooding was due to unusual rainfall in the successive years of 1914, 1915 and 1916.

One owning land on a watercourse may by ditches and drains turn into it all the surface water that would naturally drain there, but he may not thus discharge into the watercourse more water than it has capacity to carry, and thus burden his lower neighbor with more than is reasonable. In such cases, the injured party is entitled to an injunction. *Jackman* v. *Arlington Mills,* 137 Mass. 277; *McKee* v. *Delaware Canal Co.,* 125 N. Y. 353; *Noonan* v. *Albany,* 79 N. Y. 470; *McCormick* v. *Horan,* 81 N. Y. 86; *Merritt* v. *Parker,* 1 N. J. L. 460; *Tillotson* v. *Smith,* 32 N. H. 90; *Mayor* v. *Appold,* 42 Md. 442; *Baldwin* v. *Ohio Township,* 70 Kans. 102; II Farnum on Waters, § 488, p. 1633; Gould on Waters, § 274.

If one State by a drainage system turns into an interstate river water in excess of its capacity, and floods its banks in another State and thus permanently and seriously injures valuable farm lands there, may the latter State have an injunction in this Court?

The jurisdiction and procedure of this Court in controversies between States of the Union differ from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute

for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between States entirely independent, might be properly the subject of diplomatic adjustment. They must be suits "by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." "When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237. In accord with this principle, this Court has entertained a suit by one State to enjoin the deposit by another State, in an interstate stream, of drainage containing noxious typhoid germs because dangerous to the health of the inhabitants of the former. *Missouri* v. *Illinois*, 180 U. S. 208, 241; s. c. 200 U. S. 496, 518. It has assumed jurisdiction to hear and determine a bill to restrain one State from a diversion of water from an interstate stream by which the lands of a State lower down on the stream may be deprived of the use of its water for irrigation in alleged violation of the right of the lower State. *Kansas* v. *Colorado*, 185 U. S. 125, 141, 143; s. c. 206 U. S. 46, 95. In *Wyoming* v. *Colorado*, 259 U. S. 419, 464, it granted relief to one State to prevent another from diverting water from an interstate stream to the injury of rights acquired through prior appropriations of the water by land owners of the former State under the doctrine of appropriation recognized and administered in both States. In *Georgia* v. *Tennessee Copper Co.*, *supra*, it enjoined in behalf of a State the generation and spread of noxious fumes by a

factory in another State because it was a public nuisance in destroying crops and forests within the borders of the former State. In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592, at the suit of one State, this Court has enjoined another State from enforcing its statute by which the flow of natural gas in interstate commerce from the latter State was forbidden, to the threatened loss and suffering of the people of the suing State who had become dependent for comfort and health upon its use. It needs no argument, in the light of these authorities, to reach the conclusion that, where one State, by a change in its method of draining water from lands within its border, increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another State, the latter State has such an interest as quasi-sovereign in the comfort, health and prosperity of its farm owners that resort may be had to this Court for relief. It is the creation of a public nuisance of simple type for which a State may properly ask an injunction.

In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York* v. *New Jersey*, 256 U. S. 296, 309; *Missouri* v. *Illinois*, 200 U. S. 496, 521.

North Dakota, in addition to an injunction, seeks a decree against Minnesota for damages of $5,000 for itself and of a million dollars for its inhabitants whose farms were injured and whose crops were lost. It is difficult to see how we can grant a decree in favor of North Dakota

for the benefit of individuals against the State of Minnesota in view of the Eleventh Amendment to the Constitution, which forbids the extension of the judicial power of the United States to any suit in law or equity prosecuted against any one of the United States by citizens of another State or by citizens and subjects of a foreign State. The evidence discloses that nearly all the Dakota farm owners whose crops, lands and property were injured in these floods, contributed to a fund which has been used to aid the preparation and prosecution of this cause. It further appears that each contributor expects to share in the benefit of the decree for damages here sought, in proportion to the amount of his loss. Indeed it is inconceivable that North Dakota is prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled. The question of the power of this Court in such a case was very fully considered in *New Hampshire* v. *Louisiana,* 108 U. S. 76. There citizens of one State held bonds of another State, payment of which was in default. The holders assigned the bonds to their State, which, as assignee, brought an action in this Court to recover a decree for the amount due, against the obligor in the bonds. The law of the suing State authorizing the suit provided that on recovery the money should be turned over to the assignors, less the expenses of the litigation. Recovery was held to be forbidden by the Eleventh Amendment and the bill was dismissed. It was argued that as a sovereign the State might press the claims of its citizens against another State, but it was answered by this Court that such right of sovereignty was parted with by virtue of the original Constitution in which, as a substitute therefor, citizens of one State were permitted to sue another State in their own names, and that when the Eleventh Amendment took away this individual right, it did not restore the privilege of state sovereignty to press such claims. The right of a State as *parens patriae* to

bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister State. For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux Valley, is denied, for lack of jurisdiction.

Having thus pointed out the rules of law which must control our conclusion, we come to consider the much disputed issues of fact upon which our decision as to the injunction prayed turns.

The boundary line between South Dakota and North Dakota on the west, and Minnesota on the east, runs through the middle of Lake Traverse and thence north by the channel of the Bois de Sioux River until that river joins the Otter Tail River to make the Red River of the North. Lake Traverse lies in a basin between Minnesota and South Dakota. The east and west line between the two Dakotas is some five miles north of the point of discharge of the Lake into the Bois de Sioux. The basin is the bed of an ancient lake formed by glacial action. The present lake reaches from southwest to northeast, has an average width of more than two miles and is with its extended ponds and swamps about twenty miles long. To the south it has high rocky banks and is a real lake. As it extends toward the north, it is divided into smaller lakes or ponds or sloughs by deltas from entering streams. The Mustinka River reaches the Lake at its northern end just beyond the region of its high banks and makes a delta walling off Mud Lake. The Bois de Sioux flows north and is a sluggish stream, with low marshy banks for fifteen miles to a point opposite where the Rabbit River enters from the Minnesota side. Beyond that, its

banks grow higher. It flows down the eastern side of its basin so that the Minnesota low lands on its bank are of small area.

The watershed for Lake Traverse and the Bois de Sioux as far as the mouth of the Rabbit River, but not including the watershed of that river, is 1442 square miles, of which 924 miles are in Minnesota and 518 miles are in the Dakotas. Of the 924 miles of Minnesota watershed, 131 miles drain directly into the lake, and 793 miles drain through the Mustinka. Of these, the drainage from 105 miles enters below the ditches and tributaries which play any part in our problem. It will thus be seen that the drainage into the Lake and the Bois de Sioux from the Mustinka River and the ditches, here under consideration, is from a watershed of 688 miles, or something less than fifty per cent. of the whole watershed by the run-off from which the basin of the Bois de Sioux in 1915 and 1916 was overflowed. The Mustinka watershed extends northeast from Lake Traverse across a level prairie country, embracing much of Traverse County and part of Grant County, Minnesota, until it reaches on the east, north and south a much higher level of hills and hollows with lakes and standing pools called in this case the Moraine Zone. The trend of the Mustinka River bed upwards from the Lake is at first to the northeast some twenty odd miles to a point where Twelve Mile Creek enters the river from the south, thence easterly several miles to where Five Mile Creek enters the river also from the south. Above this point, the river is known as the Upper Mustinka. Of these three constituents, Twelve Mile Creek is the dominant stream, draining 364 miles, or 54 per cent. of the whole Mustinka watershed. Five Mile Creek drains 121 square miles, or 16⅔ per cent., while the Upper Mustinka drains 203 square miles, or 29 per cent. The Upper Mustinka is a winding, crooked stream with banks not always well defined, and with a fall in its

channel of 2.25 feet to the mile. Five Mile Creek is less crooked but with low banks easily overflowed and a slope of five feet in the mile. Twelve Mile Creek has a slope in its channel of 2⅔ feet for 9 miles and 1¼ feet in the next three. It has higher banks than the others and a more marked channel and rarely overflows.

The original Mustinka Ditch was intended to drain farm lands in Grant County east of Traverse County, and was built before 1900 from a point in the Upper Mustinka near the town of Norcross in a westerly direction along the valley of that stream some seven miles, cutting off its curves and crossing the Five Mile Creek south of its confluence with the Mustinka and emptying at right angles into Twelve Mile Creek. There was a great flood due to a succession of wet years in 1906 and 1907. The farmers in the lower watersheds of the Five Mile and Twelve Mile creeks concluded that the State Ditch, as it was called, was the cause of the flooding and in a petition they asked the Legislature by further work to relieve them from danger of future overflows. The Legislature was thus induced to pass an Act in 1911 containing a preamble, on the recital of which North Dakota strongly relies to support its case as admissions of Minnesota. The preamble recited that the ditch constructed before 1900 to drain lands in Grant County had in crop seasons of several years caused the flooding of 8,000 acres of farm land in Traverse County never before overflowed, to the damage of farmers in that county of $28,000, and had created a condition dangerous to the health of the inhabitants. The act then proceeds to authorize the expenditure of $35,000 by the State Drainage Commissioners to remedy the situation. The money was expended in the building of a cut-off ditch two miles and a half in length, which continued the old ditch at right angles across the Twelve Mile Creek to the main channel of the Mustinka, and also in the straightening of the river from the mouth of the cut-off

to the lake, a distance of some fifteen miles. The bend in the Mustinka which the new ditch cut off was about seven miles long, thus saving some five miles in flow of the water. The straightening of the river below the cut-off shortened the river's course from that point to the lake three miles. Half way down to the lake, the river runs by the town of Wheaton, near which in 1916 there was, notwithstanding these improvements, a wide and prolonged overflow of its banks.

The evidence in the case consisted, first, of the testimony of farmers in the overflow region in the valley of the Bois de Sioux, as to the extent of the flood and their losses in 1915 and 1916; second, of farmers in the Mustinka watershed as to the floods of 1915 and 1916 and the effect in their neighborhood, and, third, of expert engineers and a geologist as to the part played by the ditches in these floods.

The engineers who were called by North Dakota said that the immediate cause of overflow was the maintenance in Lake Traverse of a high water level of 977 feet above the sea during part of the summer of 1915 and all of 1916, that this was three feet above the mesne Lake level of 974 feet, that the last foot or more of this rise was caused by the state ditching of the Mustinka, which prolonged the floods two summer seasons. One of these witnesses, Ralph, who had been state drainage engineer, first of Minnesota and then of North Dakota, and who seems to have been employed to prepare the case for the latter State, says that the ditching on the Mustinka raised the lake from one to one and a half feet in 1916. Dean Shenehon, another engineer expert, says that when the lake is at a mesne height of 974, the Minnesota ditches are responsible for a permanent increase in the level of from three to six inches, say four inches, and that in time of flood when the lake rises to 977, the ditches account for ten inches. The varying estimates of these two principal

witnesses for North Dakota do not seem to rest on definitely ascertained data. We have no government or other gaugings of the flow from the Mustinka into the lake before the cut-off was completed in 1915. The first of such gaugings was taken near Wheaton in March, 1916. The cubic feet of flow into the Lake from the Mustinka before the cut-off ditch was constructed, is therefore a matter of judgment rather than calculation, dependent on the probable run-off during the period of floods from the watershed, the extent of detaining basins that then existed, the possible evaporation under then conditions, the cross sections of the present ditches compared with probable cross sections of the channel of the old river as it was before the ditches and the straightening of the river, and the extent to which it then overflowed its banks in time of flood. Most of these factors and their effect were a matter of unsatisfactory estimate in the absence of actual gaugings and measurements of the flow into the Lake from the old Mustinka in a state of nature. The situation was indeed complex, as Dean Shenehon expressed it. He said he could not say definitely how large a detaining basin was destroyed by the new work. He left the subject with this general statement:

"I looked over that country and in my judgment all that complex of cut-off canals and state ditches and improved Mustinka River from the outlet of the cut-off to Lake Traverse and the laterals or ditches entering it in my judgment increased the run-off of water in flood conditions substantially fifty per cent. . . . I have viewed the conditions, and in my judgment as an engineer, which is the best judgment I can give you, the run-off is fifty per cent greater than in a state of nature."

Having thus reached the proportion of increase, the witness's estimate was that the flow into the lake from the Mustinka in a state of nature was 1600 cubic second feet and that the ditching by the State added 800 cubic

feet and that increase accounted for maintenance of the high lake level and the continuous flood complained of.

This conclusion was largely dependent on the assumption that there was what Ralph called the Delta Zone covering from seventy to one hundred square miles lying immediately east of Twelve Mile Creek and extending east toward the Upper Mustinka and north beyond the line of the cut-off and old ditch. Both Ralph and Shenehon maintained that this was a low, moist, marshy region, with a rim which acted as a retaining basin for the overflowed waters of the confluence of the three Mustinka constituent streams, and that the cut-off, by draining this, prevented the former heavy loss by evaporation, accelerated the flow and increased the volume of the water carried down to the lake by one-half, and would give every recurring flood the same effect.

Ralph also insisted that in the state of nature before the ditching, whenever there was high water in the Mustinka, the water flowed north over a ridge or low height of land into the sources of the Rabbit River in Tintah Slough, that thus a very considerable amount was carried directly to the Bois de Sioux basin, some fifteen miles north of the Lake, and that by this diversion, the level of the Lake was kept lower. Now, he said, the cut-off made this diversion negligible and of course added to the flow into the Lake. The weight of the evidence, however, is that it has only been when the level of the Mustinka River at the confluence with the Twelve Mile Creek exceeds the height of 998 feet above the sea, that it has flowed into the Rabbit River, that it reached this height during the summers of 1915 and 1916, and that then the same amount of water flowed over into the Rabbit Creek as formerly. While in a general way Ralph was corroborated by Dean Shenehon and Professor Chandler, another expert witness, neither of these at-

tached much importance to the part played by the diversion into the Rabbit River from the Mustinka either before or after the state ditching works.

The case for North Dakota was much weakened by the weight of evidence showing that the great detaining basin in the so-called Delta Zone was non-existent. The testimony of three engineering experts and a geologist called by Minnesota, who examined the watershed, as well as the numerous farmers and oldtime residents who lived on, and successfully cultivated, all of the Delta Zone, was convincing to show that the land was ordinary prairie land with an inclination to the north and northwest of five feet in a mile down to the Mustinka, and without any rim or rising border to make a detaining basin. The slope of the Zone was said by one competent witness to be greater than that of much of the fertile prairie lands of Illinois. There were only two places in the neighborhood which could be described as possible detaining basins. One was the Redpath Slough which yields wild hay in a dry season and covers an area of six or seven square miles. The other was Tintah Slough, a basin of like character, already referred to as one of the sources of the Rabbit River and not in the Mustinka watershed.

The testimony adduced by the defendant State tended to show that the new cut-off which had been constructed to avoid floods in this region in high water was not regarded as effective by those who had pressed for its construction, because in times of flood their lands were overflowed apparently as much as before. There was substantial evidence that the cut-off did not run full in times of the highest water, because of the obstruction from the onrush at such times of the Twelve Mile Creek at right angles across the union of the old and new ditches. The Twelve Mile Creek thus dominated the ditches to such an extent that it carried much of its water north to its old confluence with the Upper Mustinka, and round the old

bend of that stream of six or seven miles. The result, as estimated by Minnesota's witnesses, was that the old bend at the crest of the flood carried twice as much water as the cut-off.

Professor Bass for Minnesota testified that at the time of flood it took nine hours for the water by way of the cut-off from Twelve Mile Creek to reach the Lake and thirteen hours by way of the old Bend, and his estimate was that before the cut-off was built it would have taken eighteen hours. This would seem to indicate that the difference in speed of flow into the Lake made by the new cut-off in a flood which lasted all summer would be negligible in effect. Doubtless the ditches of the Mustinka helped to carry the water into the Lake faster than before they were constructed, but a speedier flow of the same amount of water would in an entire summer of flood have but little effect on the height of the lake, or the overflow in its outlet through the Bois de Sioux Valley. Mr. Meyer and Mr. Morgan, witnesses for Minnesota, and both engineers of great experience in floods, say that a more rapid flow into a lake with an outlet will not raise the level of the lake as high as a slower inflow because the more rapid the inflow the greater the opportunity for outflow during the period of rising.

An additional factor of the high water on the banks of the Bois de Sioux in time of flood, as pointed out by Professor Bass, was in the railroad embankments and county roads crossing the whole slough-like basin of the Bois de Sioux. These with their limited outlets, he thought, served to dam the flooded river in its sluggish flow. He also called attention to the obstruction by the back water from the discharge of the Rabbit River which delivered itself with such force as to throw gravel and debris over to the opposite bank of the Bois de Sioux. Professor Bass relied on special measurements made for the purpose by

a competent engineer, of the capacity of the Bend, the Twelve Mile Creek, and the old ditch and the new cut-off, as well as that of the straightened river between the cut-off and the Lake, the extent of the flooding half way down the river to the Lake near Wheaton and the basin of the Bois de Sioux. He testified that when the Lake was at the highest flood level, the added and more rapid flow due to the ditches did not increase this more than two inches and was negligible in creating a flood in the Bois de Sioux.

A marked difference between the evidence of the experts for the complainant and of those for the defendant was in respect to the effect they attributed to the rainfall in 1914, 1915 and 1916. Those for North Dakota insisted that in neither 1915 nor 1916 was there the exceptional rainfall to produce the unusual flood in the Bois de Sioux Valley and that this was a significant fact in support of the view that the exceptional overflow in that valley was due to the artificial cut-off and the straightening of the Mustinka River bed. This contention was met and completely overcome by the Government records and other evidence of the rainfall and floods in 1915 and 1916 in the whole upper Red River Valley. The evidence satisfactorily establishes the fact to be that the flood in 1915 and that in 1916 exceeded any flood in that region for a succession of years since 1881. Great floods seem to have occurred about every ten years and to have been the result of excessive precipitation for three successive years. One was in 1881. Another of these was in the period of 1895, 1896 and 1897. Another was in the period of 1905, 1906 and 1907, and a third was in the period of 1914, 1915 and 1916. The last two were greater than the second. There was a run-off all over the upper Red River Valley in the year 1916 greater than in any period preceding since 1902. There were heavy rains in 1914, so that in October there was an accumulated excess of 3.54 inches. In 1915 the

excess continued to grow until in October of that year there was an excess of 7.94 inches. Winter came on when the waters were at flood and froze them, so that the spring freshets of 1916 were very heavy and these were succeeded by heavy precipitation in June and July, so that by the fall of 1916 there was an excess of 16.15 inches. The flood was thus continuous during the whole summer season of that year. There was no opportunity to plant in the Fall of 1915 because it was so wet, and in 1916 cultivation was impossible. The soil was described as mush. The farmers of all that region, not only in the valley of the Bois de Sioux but in the Mustinka watershed and elsewhere in the upper valley of the Red River, had only a third or half of a crop in 1915, and in 1916 there was no crop at all, due to excessive and continuous rain.

It is not contended on behalf of the complainant that the damage from the floods of 1915 and 1916 in the Bois de Sioux was due to the higher flood line reached in those years so much as to the prolonged period during which the waters lay on the flooded area. It is admitted that such freshets were to be expected in the spring from time to time, but it is said that previously they had only lasted from three to eight days, and that the water receded, leaving the land on the banks of the Bois de Sioux cultivable and productive in the proper season. We can not fail to note, however, that this strip half a mile to two miles wide and fifteen miles long, injury to which is complained of, was low and subject to overflow. There were sloughs in it running into the Bois de Sioux and the government survey showed on the plats that 27 per cent. of it was marshy. Much of the tract was good farming land except in time of excessive flood which the history of the region shows, as we have said, was to be expected about every ten years.

It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly

and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, can not undertake to pass. In such cases, the court looks about for outstanding facts from which the lay mind can safely draw inferences as to the probabilities. The court is also aided by its judgment of the care and accuracy with which the contrasted experts respectively have determined the data upon which they base their conclusions. The experts called by Minnesota in this case seemed to us to use more specific and accurately ascertained data for their estimates than those for North Dakota, and this circumstance, as well as the more satisfactory reasons given, lead us to think that their conclusions are more to be depended on.

When we consider the extent and prolonged period of the floods of 1915 and 1916, covering, as they did, the whole upper valley of the Red River, of which the Mustinka watershed was but a small part, when we note that that watershed is only one-half of what feeds Lake Traverse, when we find that all this upper Red River valley was drenched with continuous rain for two summer seasons, with a frozen flood between them, when it appears that the farmers of the Mustinka valley lost as much of their crops in 1915 and had as total a loss in 1916 as the farmers on the Dakota banks of the Bois de Sioux, when we know that these farmers in the Bois de Sioux are used to frequent floods in the spring for three to eight days because of the low level of their lands, the system of state ditching in the Mustinka sinks into a circumstance of negligible significance in the consideration of the mighty forces of Nature which caused these floods. To attribute to such a minor but constant artificial incident a phenomenal effect for two whole summer seasons without a recurrence since is to fly in the face of all reasonable probability. The evidence must be clear and convincing indeed to support such a theory. Instead of that it is a

combination of estimates, and conjecture based on no accurate knowledge of the flow of the Mustinka before the ditches were put in, and depending greatly on a hypothetical detaining basin in the so-called Delta Zone, existence of which the greater weight of the evidence negatives. Moreover, as already pointed out, the burden of proof that the State of North Dakota must carry in this case is much greater than that imposed on the ordinary plaintiff in a suit between private individuals.

The possibility of saving these Bois de Sioux lands from recurring floods, whether each year or every ten years, by controlling and distributing the flow from the Lake and making larger its outlet, suggests itself even to the layman. The capacity of the present outlet is between 1200 and 1500 cubic second feet, offering too small opportunity for safe escape of the high water of the lake which experience shows may be expected in that region. Accordingly, after the first hearing of this case, without reaching a conclusion as to the legal responsibility for the overflow complained of, and with the thought that the Court might be able to provide for a proper remedy in its decree, it ordered a rehearing and the taking of supplemental proof deemed necessary to an adequate consideration and disposition of the cause, as to the possibility and cost of ameliorating the flood conditions by means other than the injunction prayed in the bill. [256 U. S. 220.] The order specified the projects to which the proof should be directed as follows:

First, to a project for detaining basins in the Mustinka River watershed,

Second, to a sluice dam in Lake Traverse,

Third, to improvements of the Bois de Sioux outlet by increasing its capacity,

Fourth, to making an outlet from the lake across a height of land into Big Stone Lake which drains into the Mississippi, and

Fifth, to a larger diversion of the Mustinka River waters into the Rabbit River.

The Court also directed proof as to the flood conditions which had prevailed in the area claimed to have been flooded since the filing of the bill. Three engineers were to be called on each side.

All the remedies suggested by the Court were rejected by the engineers of both sides as impracticable except those of a sluice dam in Lake Traverse and the enlarging of the capacity of the lake outlet through the Bois de Sioux. The engineers for North Dakota thought that such an improvement could be constructed for about $100,000, while the engineers for Minnesota insisted that the dam and dredging provided at that cost would be a mere temporary and unsatisfactory makeshift and that ampler works needed for a permanent remedy would require an expenditure of from two and a half to five times as much. The evidence further showed that there had been no flooding of the lands in question since the filing of the bill, a period of six years, although there had been a very great rainfall and large increases in the flow of the Mustinka River in the spring of 1917 which was followed by a dry season.

The conclusion we have come to on the main issue of fact that Minnesota is not responsible for the floods of which complaint is made, makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two States in a possible effort by either or both to remedy existing conditions in this basin.

The bill is dismissed without prejudice.

The costs were adjudged against the plaintiff. See *post*, p. 583. REPORTER.

EX PARTE IN THE MATTER OF THE UNITED STATES, AS OWNER OF NINETEEN BARGES AND FOUR TOWBOATS, PETITIONER.

PETITION FOR A WRIT OF PROHIBITION.

No. 23, Original. Argued on return to rule to show cause November 19, 20, 1923.—Decided December 10, 1923.

A suit in the District Court against federal officials involving the plaintiff's rights to personal property under leases from the United States and to an injunction preventing the defendants from taking it from his possession, should not be restrained by a writ of prohibition from this Court, upon the ground that the suit in effect is against the United States, where the questions of property and possession presented are doubtful, and where, if they be erroneously decided, the remedy by appeal from the District Court will be adequate. P. 392.

Rule discharged; petition denied.

APPLICATION by the United States for the writ of prohibition to restrain the District Court from entertaining further jurisdiction over a suit against federal officers, which was alleged to be in effect a suit against the United States and its property.

Mr. Lon O. Hocker, Special Assistant to the Attorney General, with whom *Mr. Attorney General Daugherty* and *Mr. Solicitor General Beck* were on the brief, for the United States.

Right to prohibition: *Naganab* v. *Hitchcock,* 202 U. S. 473; *Smith* v. *Whitney,* 116 U. S. 167; *In re Rice,* 155 U. S. 396; *Ex parte Simons,* 247 U. S. 231; *Ex parte State of New York,* 256 U. S. 490; *Ex parte Chicago, R. I. & P. Ry. Co.,* 255 U. S. 273; *Ex parte Peterson,* 253 U. S. 300.

The suit in question is against the United States. *Louisiana* v. *McAdoo,* 234 U. S. 627; *Wells* v. *Roper,* 246 U. S. 355; *Hagood* v. *Southern,* 117 U. S. 52; *In re Ayers,*

123 U. S. 443; *The Siren*, 7 Wall. 152; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Stanley* v. *Schwalby*, 162 U. S. 255; *Carr* v. *United States*, 98 U. S. 433; *Louisiana* v. *Garfield*, 211 U. S. 70; *New Mexico* v. *Lane*, 243 U. S. 52; *Goldberg* v. *Daniels*, 231 U. S. 218; *Belknap* v. *Schild*, 161 U. S. 10. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, distinguished.

Mr. Joseph T. Davis and *Mr. Douglas W. Robert*, with whom *Mr. Charles Claflin Allen* was on the brief, for respondents.

Mr. JUSTICE MCKENNA delivered the opinion of the Court.

Motion on part of the United States, as asserted owner of nineteen barges and four towboats, praying a writ of prohibition to be directed to the Hon. C. B. Faris, a Judge of the District Court, Eastern Division of the Eastern Judicial District of Missouri, and the other Judges thereof, to prohibit him and them from asserting and exercising jurisdiction in a certain suit brought March 25, 1923, by Edward F. Goltra against John W. Weeks, Secretary of War, and other officers of the United States, in which it was averred that a contract was made between the United States, represented by Major General William M. Black, Chief of Engineers of the United States Army, as lessor, and Goltra, as lessee, whereby the boats and barges, then under construction by the United States, were leased and chartered to Goltra for the period of five years from the date of delivery of the boats and barges to him, Goltra, upon the payment of certain periodical rentals and a compliance by Goltra of other terms and conditions.

The suit by Goltra, the pleadings in which are detailed in the petition, was brought to determine his rights under the contract and a supplement to it.

The contract was preceded by negotiations between Goltra and representatives of the Government, particu-

larly with the War Department and the then Secretary of War, which included among other things the construction of a fleet of towboats and barges in the then emergency of war. But after the signing of the Armistice, when the emergency of war had ceased, other negotiations were had between Goltra and the War Department and the Secretary of War, and a lease was made, the contract above, whereby the boats and barges were leased to Goltra, by him to be operated on the Mississippi River and its tributaries as a common carrier, he to pay all operating expenses, to take out fire and marine insurance, and incur and discharge other obligations.

On May 26, 1921, the supplement to the contract was entered into between Major General Beach, then Chief of Engineers of the United States Army, the successor of Black.

On March 3, 1923, Weeks as Secretary of War undertook to cancel the contract for the non-compliance by Goltra, as lessee, with its terms and conditions, and demanded the return of the boats and barges to the United States, and the defendants on March 25, 1923, unlawfully took possession of some, and were about to take possession of the remainder of them.

There was a prayer by Goltra for a temporary restraining order against such action, or against any action interfering with his possession. There was also a prayer for a temporary injunction against any act whatsoever looking to the cancellation and termination of the lease, or the retention of the boats and barges taken before the attempted cancellation of the contract. The prayer was, that, upon final hearing, a decree be entered in favor of Goltra to determine his rights under the contract and to perpetually enjoin the defendants from interfering in any way with his rights thereunder.

A mandatory order was issued as prayed, and an order to show cause why a temporary injunction should not be issued.

In response to the order to show cause the Attorney General filed suggestions against the jurisdiction of the court, and subsequently the other defendants made returns to the order averring that the suit was, in purpose and effect, one against the United States and its property.

A motion was made in accordance with the representations. It was overruled, and the defendants granted time to plead.

It is alleged in the petition that unless restrained the District Court Judge will proceed with the cause and issue an injunction as prayed by Goltra, and that such order will deprive the United States of the possession and use of boats and barges of the value approximately, of $3,800,000.

Prohibition was prayed as above stated.

The return of Judge Faris to the petition concedes some of its allegations and denies others. It denies the character ascribed to Goltra's suit. It alleges that there is a right of possession of the boats and barges in Goltra, and that while his bill was in course of preparation the defendants in the suit were proceeding with a large force of men to take from him and remove from St. Louis the boats and barges that remained in his possession. And that the suit was not one against the United States but against individual defendants who were proceeding in violation of law. And it is averred that there is an adequate remedy by appeal.

The answer of Goltra to the petition is presented with elaborate detail of fact and argument. In foundation and essence it is the same as that of the District Court. The opinion of the court, which was oral, is attached to it. The opinion cites that of Judge Baker in *United States Harness Co.* v. *Graham,* in the District Court for the Northern District of West Virginia, 288 Fed. 929.

The merits of the case present interesting questions. The question of the remedy is, however, the more insistent. Does the case justify it? Prohibition is a remedy

of exigency and in exclusion of other process of relief. It is directed against unwarranted assumptions of jurisdiction or excesses of it. In some cases there may be instant judgment that such is the situation and the writ granted. In other cases there may be doubt and the writ denied. *Ex parte Muir*, 254 U. S. 522, 534. And doubt in the instant case would seem to be justified, for two District Courts have decided that, under circumstances such as presented in this case, it does not involve or constitute a suit against the United States. And also the writ is to be denied if there be remedy against the action complained of by appeal.

Ex parte Oklahoma, 220 U. S. 191, and cases cited, is a complete exposition of the writ and its uses. The opinion in that case observed the distinctions of prior cases, that is, that the writ is a remedy against unwarranted assumptions of jurisdiction and that, besides, the condition of its issue is that the party attacking the jurisdiction has no other remedy. In other words, the writ cannot be made to perform the office of an appeal or writ of error. Are the decisions applicable here?

There was submitted to the court the contracts and their construction and effect—whether under them the United States or its officers retained property in the boats and barges or whether that property was transferred with the right of possession to Goltra. The court so construed them, adjudging Goltra's right to the property and, necessarily, his right to the possession of it, and that he was entitled to an injunction to protect that possession pending the suit. From that decision there was right of review by appeal, and it would be timely and adequate for relief if the decision were erroneous. Judicial Code, § 129; *U. S. Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 214; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 136; *Ex parte Chicago, Rock Island & Pacific Ry. Co.*, 255 U. S. 273.

Writ denied.

LEHMANN *v.* STATE BOARD OF PUBLIC ACCOUNTANCY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 170. Motion to dismiss or affirm submitted November 26, 1923.—Decided December 10, 1923.

A state statute authorizing a board to grant certificates of registration to qualified persons as certified public accountants, and empowering it, upon notice and hearing, to cancel any registration so granted for unprofessional conduct of the certificate holder, but leaving the individual free to practice accountancy without procuring a certificate and after a certificate granted has been canceled, *held*, not violative of the due process clause of the Fourteenth Amendment or the provision of the Constitution against *ex post facto* laws, in the case of one who, having obtained such a certificate, sought to enjoin the board from hearing charges looking to its revocation, upon the ground that the statute conferred arbitrary power by not defining more specifically the cause for revocation and that the board had promulgated no definitive rules. P. 397.

208 Ala. 185, affirmed.

ERROR to a decree of the Supreme Court of Alabama affirming a decree which dismissed a bill to enjoin a state board and its members from hearing charges preferred against the plaintiff looking to the revocation of his certificate as a public accountant, and to enjoin the other defendants, who had made the charges, from prosecuting them. The section of the Alabama statute governing the proceedings before the board is set forth below.[1]

[1] "That the Alabama State Board of Public Accountancy may revoke any certificate issued under this act, or may cancel the registration of any certificate registered under this act, for any unprofessional conduct of the holder of such certificate, or for other sufficient cause, provided that written notice shall have been mailed to the holder of such certificate twenty days before any hearing thereon, stating the cause for such contemplated action and appointing a day for a full hearing thereon by said board, and provided further that no certificate issued under this act shall be revoked until such hearing shall have been heard." Acts 1919, p. 126, § 7.

Mr. James J. Mayfield, for defendants in error, in support of the motion.

Mr. Erle Pettus, for plaintiff in error, in opposition to the motion.

Mr. JUSTICE MCKENNA delivered the opinion of the Court.

By a statute of the State, a board denominated the Board of Public Accountancy was created. The Board has authority to examine applicants for certificates or licenses to practice the business or calling of public accountant and to issue certificates to those whom the Board deems qualified.

The Board is given power to cancel the certificate granted "for any unprofessional conduct of the holder of such certificate, or for other sufficient cause," upon written notice of 20 days and a hearing thereon. The defendants in error, Aldridge, Edson and Rosson, constitute the Board.

Complaint was made against plaintiff in error by the other defendants in error, who are public accountants, a day set for hearing and notice thereof given to plaintiff in error as required by the statute.

He appeared at the time appointed, but subsequently brought this suit praying that the Board and its members be enjoined and restrained from hearing the charges preferred against him, or from making or entering any order revoking or attempting to revoke the certificate issued to him, or from interfering in any way with the practice of his profession as such certified public accountant. It was also prayed that the other defendants in error be enjoined from prosecuting the charges that they had preferred.

A temporary restraining order was issued and an order to show cause why it should not be made permanent.

The bill was dismissed on demurrer for want of equity, and on appeal to the Supreme Court the decree was

affirmed. The Chief Justice of the court then granted this writ of error.

The ground of it, and the reliance here, is, expressed in several ways, that the statute of the State is in conflict with the constitution of the State and also in conflict with the Constitution of the United States, the latter in that the statute deprives plaintiff in error of his property without due process of law, and subjects him to an *ex post facto* law.

The bill is very long. Its important facts are as follows: Plaintiff in error had "by experience and assiduous attention to his duties built up a large and lucrative business." Upon the appointment of the Board he applied for, and was issued, a certificate, after standing the tests and examinations prescribed, and since that time he has been practicing his profession as a certified public accountant.

The Board has never adopted any code or promulgated any rules or definition of what is or is not professional conduct, or what is sufficient cause for the revocation of a certificate.

He appeared before the Board at the day appointed for the hearing of the charges against him and was informed by the Board that there were no rules in effect to govern or control the hearing, and evidence would be received with some liberality. The hearing was continued until January 26, 1922, and plaintiff in error notified to be back on that day for the purpose of being tried.

It is nowhere averred in the charges against him that anything that he had done was wrongful or unlawful, the only allegation being that the alleged acts complained of were surreptitious.

The acts are enumerated and it is expressly denied that he was guilty of anything wrongful, surreptitious or unlawful.

It is further averred that the Board has prejudged his acts, and that the determination by the Board as to

whether his certificate should be revoked rests wholly within the arbitrary, uncontrolled and unappealable judgment of the Board.

The unconstitutionality of the act is averred both under the state and federal constitutions.

The contention that the statute and the powers it confers upon the Board and the manner of their exercise are in derogation of the constitution of the State is decisively decided against by the opinion of the Supreme Court of the State and, we may say, that there is persuasion in the reasoning of the court against the contention that the statute is in conflict with the Constitution of the United States. That is, that the statute is in effect an *ex post facto* law or, if enforced against him, will deprive him of his property without due process of law.

The opinion of the court sustained the Board, its powers, and the manner of executing them, but refrained from expressing an opinion of the right or remedy of plaintiff in error. It said, "It is neither necessary nor proper for this court to now decide what remedy, if any, would be available to the appellant [plaintiff in error], if his certificate or license should be improperly or illegally revoked or canceled." In other words, the court declined to anticipate the action of the Board; it decided only that if the State had the power to confer a certificate on the plaintiff in error through the Board, it had the power, through the Board, to take it away or to prescribe the terms and conditions upon which it might be forfeited. And the court further said that the appeal was without equity, since neither the trial court nor it could know in advance of the hearing that the Board would sustain the charge.

The reasoning is conclusive. The procurement of a certificate was deemed of value by plaintiff in error. It was the confirmation of his reputation, giving to it the

sanction of an official investigation and judgment. He knew the condition of its issue, knew that the conduct that secured it was a condition of its retention, that for inconstancy of merit it could be forfeited, and forfeited if it had been improvidently granted or procured by concealment or deception. And necessarily so, or the certificate would be a means of pretense.

Plaintiff in error puts some stress upon the absence of rules by the Board, urging that the statute is in conflict with the Constitution of the United States because it purports to authorize the revocation of a certificate "without defining or determining in advance what grounds or facts or acts shall be sufficient cause for such revocation." Such absence permits, it is asserted, arbitrary action. We cannot yield to that assertion or assume that the Board will be impelled to action by other than a sense of duty or render judgment except upon convincing evidence introduced in a regular way with opportunity of rebuttal. We certainly cannot restrain the Board upon the possibility of contrary action. Official bodies would be of no use as instruments of government if they could be prevented from action by the supposition of wrongful action.

This Court and other courts have decided that a license or certificate may be required of a physician, surgeon, dentist, lawyer or school teacher. *Douglas* v. *Noble,* 261 U. S. 165, has pertinent comment upon the power of the legislature in that regard. The Supreme Court in the present case construed the statute as not so exacting of public accountants. In other words, it was decided that the indicated professions require a license or certificate but that a public accountant requires none. And it was decided that a public accountant gets no right of business from the grant of a certificate; he loses no right of business by its cancellation.

The statute is not, nor are the proceedings before the Board, such as plaintiff in error conceives them. The

cases he cites are, therefore, not pertinent and need no review.[1]

The motion to affirm must be granted.

So ordered.

DOMINGO DIAZ A., ET AL. *v.* PATTERSON.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 113. Argued November 28, 1923.—Decided December 10, 1923.

1. Owners of a registered title to land in the Canal Zone who are in possession and have maintained it for the period of extraordinary prescription (Civ. Code, Art. 2531,) cannot be disseized and deprived of the property by the mere registration of what purports to be a conveyance by a stranger to the title and subsequent lapse of the ten year period of ordinary prescription. Civ. Code, Art. 2526. P. 400.
2. Reasons for following local decisions in Porto Rico, with its own peculiar system of law, do not apply in the same degree to the Panama Code in its present application to the Canal Zone. P. 402.
3. A decision of the Circuit Court of Appeals reversing a decree of the Court of the Canal Zone, held not *res judicata* on second appeal to the former court or on review of its final decision here. P. 402.
4. Failure of the court to order notice to unknown claimants in a suit over title to land will not avail a plaintiff who fails to establish any title or interest in himself. P. 402.

281 Fed. 394, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree recovered by the defendant, here appellee, in a suit brought by the appellants in the United States Court for the Canal Zone to confirm their title to a tract of land and, later, to the money for which it was expropriated by the United States.

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[1] *Hill* v. *Wallace*, 259 U. S. 44; *Booth* v. *Illinois*, 184 U. S. 425, 428; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357; *Adams* v. *Tanner*, 244 U. S. 590. Some state cases were cited.

Mr. William H. Jackson for appellants.

Mr. Edwin T. Merrick, with whom *Mr. Ralph J. Schwartz* was on the briefs, for appellee.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the heirs and representatives of Domingo Diaz against Patterson alleging their possession of an estate known as Lo de Caceres in the Canal Zone and an adverse claim set up by Patterson. It prays that the petitioners may be confirmed in their title and, by an amendment, that all parties claiming any interest in the land may be summoned to appear in this case and that the petitioners may be declared entitled to a fund deposited in the registry of the Court, since this suit was begun, upon expropriation of the land by the United States. At the first trial the petitioners obtained a decree, but as material questions of fact had not been decided by the Judge the decree was reversed by the Circuit Court of Appeals. 262 Fed. 899. At the second trial there was a careful finding of facts and a decree for the defendant, Patterson, which was affirmed by the Circuit Court of Appeals. 281 Fed. 394. The petitioners appealed to this Court and contend that they have been denied rights conferred upon them by the laws of the Canal Zone.

The trial Court and the Circuit Court of Appeals have found that the defendant has established recorded title to the land by an unbroken chain from the original grant from the Spanish Crown in 1695, and also that he and his predecessors have held open, uninterrupted, and notorious possession of the same since 1790. These findings we shall not disturb. The facts relied upon by the petitioners are that there was a sale in 1832, afterwards set aside, purporting to convey the land; that the heir of the grantee made a simulated sale to herself, and that this

fictitious title was recorded in 1895, although none of the grantees ever was in possession at any time, or brought any action until 1917, in which year the present suit was begun. The ground of this extraordinary claim is found in Art. 2526 of the Civil Code of Panama. "The acquisitive prescription of real property or of real rights constituted therein does not obtain against a recorded title, except by virtue of another recorded title, nor shall it begin to run but from the date of the record of the second." The petitioners contend that the effect of this Article is that the mere recording of what purports to be a conveyance by a stranger to the title who is and remains out of possession, will give to the grantee a good title by what is called the ordinary prescription of ten years, Art. 2529, notwithstanding the requirement of regular uninterrupted possession for that result in Art. 2528. It is argued that constructive possession follows the record and is enough, and it is supposed that this transaction will defeat the previous registered possession and title by ordinary prescription although by Art. 789 that possession does not cease until the record is cancelled, by consent, or by a transfer from the registered possessor, or by a judicial decree. It is supposed also to destroy a title complete by the extraordinary prescription of thirty years to which "no title whatsoever is necessary" Art. 2531.

The effect attributed to Art. 2526 depends in part upon its operation after the Canal Zone was taken over by the United States as the ten years had not run when the Zone was transferred. It would be extreme to construe the article as meaning something different now from what it would have meant before the transfer. Taking it simply as a law of the United States we should see no reason for attributing to it the unjust operation contended for. It is not necessary to consider what such a registration might do in the way of interrupting a pre-

scription not yet complete, but we see no sufficient ground for converting it into a disseizin when the previous owners maintain their possession undisturbed under a registered title in favor of which prescription already has run. If we recur to the origin of the law we do not believe that a different view would be taken in Panama. But the considerations that have been urged for following local decisions in places like Porto Rico having their own peculiar system, do not apply in the same degree to a code that in its present application governs a predominantly American population and derives its force from Congress and the President. *Panama R. R. Co.* v. *Bosse,* 249 U. S. 41. The opinion of the Circuit Court of Appeals on the first appeal was not *res judicata* or conclusive here, as the defendant seems to suppose, *Remington* v. *Central Pacific R. R. Co.,* 198 U. S. 95, 99, 100; *Messenger* v. *Anderson,* 225 U. S. 436, 444; but we are of opinion that upon the question before us it was right.

The petitioners attempt to fortify their case by the absence of an order calling upon the rest of the world to come in and assert whatever claim anyone may have to the fund in the registry of the Court. The purpose of the suit was to remove Patterson's claim to the land. He alone was made a party. It does not concern the petitioners after their failure to establish either possession or title, whether some third person has a better title than Patterson or what precautions the Court shall take before giving him the fund that has taken the place of the land.

The record is at once defective and unduly prolix, and this and other considerations perhaps might have warranted a dismissal of the appeal. But as both parties desired a decision upon the merits and as the costs will fall upon the appellants we have thought it better to indicate our opinion that the reasons for the appeal are untenable and that the decree should be affirmed.

Decree affirmed.

NATIONAL ASSOCIATION OF WINDOW GLASS MANUFACTURERS ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 353. Argued November 22, 23, 1923.—Decided December 10, 1923.

1. Whether an agreement between all the manufacturers of a commodity and a union representing all the labor obtainable for its manufacture, violates the Sherman Law, when it concerns only the way in which the labor shall be employed in production, and not sales or distribution, depends upon the particular facts. P. 411.
2. The manufacturers of hand-blown window glass,—an article costing twice as much to produce, but sold at the same price, as window glass made with the aid of machines, the price of the latter necessarily fixing the price of the former,—finding the supply of workmen in their industry insufficient to run their factories continuously during the working season, and being unable to run undermanned without serious loss, made an arrangement with the workmen, through their union, whereby, in effect, all the available labor was apportioned to part of the factories for part of the season and to the others for the remainder, so that all the workmen were secured the advantage of continuous employment through all the season, and each factory secured its share of labor for one period and closed down during the other. *Held*, not a combination in unreasonable restraint of trade, assuming that it might affect interstate commerce. P. 412.

287 Fed. 228, reversed.

APPEAL from a decree of the District Court which enjoined a combination of the appellants, at the suit of the United States, under the Sherman Law.

Mr. John W. Davis, with whom *Mr. Montgomery B. Angell* was on the brief, for National Association of Window Glass Manufacturers, appellant.

I. The wage scale agreement deals solely with manufacture, not with interstate commerce. Its effects upon

commerce, if any, are purely indirect and incidental. *United States* v. *Knight Co.*, 156 U. S. 1; *Anderson* v. *United States*, 171 U. S. 604; *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Delaware, etc., R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Crescent Co.* v. *Mississippi*, 257 U. S. 129; *Gable* v. *Vonnegut Co.*, 274 Fed. 66; *Oliver Co.* v. *Lord*, 262 U. S. 172; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Kidd* v. *Pearson*, 128 U. S. 1. Where the subject matter of the contract or combination is sales of articles in interstate commerce, as in *Standard Sanitary Co.* v. *United States*, 226 U. S. 20; *Straus* v. *American Pub. Assn.*, 231 U. S. 222; *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600; *Addyston Co.* v. *United States*, 175 U. S. 211; *Swift & Co.* v. *United States*, 196 U. S. 375, the interstate commerce is directly affected; in fact, such was the end in view. *Loewe* v. *Lawlor*, 208 U. S. 274; *Duplex Co.* v. *Deering*, 254 U. S. 443; and *Montague & Co.* v. [illegible]*owry*, 193 U. S. 38, are distinguishable.

II. The wage scale agreement is within those legitimate objects of labor unions which are exempted from the operation of the Sherman Act by the provisions of the Clayton Act. *Hitchman Co.* v. *Mitchell*, 245 U. S. 229; *National Fireproofing Co.* v. *Mason Builders' Assn.*, 169 Fed. 259; *Hopkins* v. *United States*, 171 U. S. 578.

III. The wage scale agreement, with its two-period system, if it can be said to relate to commerce at all, is not an undue or unreasonable restraint. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *Standard Sanitary Co.* v. *United States*, 226 U. S. 20; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 226 U. S. 324; *Nash* v. *United States*, 229 U. S. 373; *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600; *Chicago Board of Trade* v. *United States*, 246 U. S.

231; *United States* v. *U. S. Steel Corporation,* 251 U. S. 417; *United States* v. *Knight Co.,* 156 U. S. 1; *United States* v. *Addyston Co.,* 85 Fed. 271; *Anderson* v. *United States,* 171 U. S. 604; *Swift & Co.* v. *United States,* 196 U. S. 375; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, was on the brief, for the United States.

I. The restraint is for an unlawful purpose. No more complete or indefensible monopoly was ever established in any anti-trust case. It controls substantially all of the hand-blown glass industry—a necessary material in the building industry.

The exigencies of the war required the Government to make a partial restriction in the production of glass, but when the war had ended the exigency passed. Unfortunately in that period of restriction both manufacturers and the employees in this industry temporarily realized the advantages to them of limiting production. On the one hand, the manufacturers found that if production could be restricted below the demand of the public, the question of price was in their control and, thus basing an artificial price upon an artificial scarcity, they believed that they could make more money on a lessened production than if they met the demands of the market. Similarly, those who controlled the glass workers' union erroneously believed that a compulsory restriction of production would increase the demand for the product and therefore the wages of labor. To centralize power, the constitution of the union was interpreted as a virtual power of attorney to the wage committee to act as it pleased, without respect to the wishes of the members of the union. No other committee or officer had any authority in the matter, except that, after the wage agree-

ment was made, the executive board applied it to each manufacturer by allotting to him the first or second period, or both, if he were willing to operate two distinct plants. Even a referendum to the members of the union was powerless to overrule the arbitrary action of the wage committee.

II. The restraint has been imposed against the wishes of many of the manufacturers and of a large majority of the workers.

Both employer and employee were denied any freedom of action. No free labor market existed. The union had surrounded the industry with a wall, that no one could surmount. No manufacturer could operate without the consent of the union. The whole industry, employer and employee alike, only existed by the sufferance of a wage committee.

If it be true, as is claimed, that this alleged "dying industry" can not survive without the restrictions in question, then it is intolerable that the public should pay on capital expenditure for a whole year and only get in return a very restricted production of eighteen weeks. Such a proposition is economically indefensible. That such is not the case is clearly indicated by the fact that, until the industry was put on half-time during the war, it not only survived but, measured by the number of employees, was growing.

The testimony shows that hand-made glass is better in quality than machine glass, and presumably there will always be a market for the better quality. It is, however, unnecessary to theorize on this subject. The law of competition requires that the ability of any industry to survive should be put to the practical and unrestricted test.

The Government made little of the question of prices, for another indefensible feature of this monopoly was that there was no competition even in sales. The testimony

of the manufacturers themselves was that, having originally pooled their sales through a common selling agency, they subsequently and apparently by concerted action sold at the price fixed by the leading factory in the machine glass industry. Thus there was as little competition in selling price as there was in production.

III. The existing deficiency in the labor supply is not natural but is due to restrictions imposed upon those who wish to work in the industry. The record discloses that the great reduction in the number of workers has occurred since the installation of the two-period system and that a large majority of the members of the union are opposed to that system.

The shortage of labor was also due to the restrictions upon the manufacturers in the securing of the necessary workers.

IV. The plan restrains interstate commerce. The actions of this union, in agreeing or refusing to agree with separate manufacturers were steps in the execution of an illegal plan upon which there had been an earlier agreement or understanding between the manufacturers' association and the union. The manufacturers' association comprised the major portion of the manufacturers of hand-blown window glass, and controlled all, and the union comprised substantially all of the workers in the industry. It was alleged and proved that a large portion of the glass manufactured was shipped in interstate commerce, that dealers in the glass were not able to fill all of their orders for interstate shipment, and that interstate commerce was very materially restrained by the severe time limits which were imposed by virtue of the agreement between the manufacturers' association and the union. The restraint was not merely minor and incidental, but great and intentional. Distinguishing: *United States* v. *Knight Co.*, 156 U. S. 1; *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344; *American Column Co.* v.

United States, 257 U. S. 377; *United States* v. *Reading Co.,* 226 U. S. 324; *Nash* v. *United States,* 229 U. S. 373; *Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501; *United States* v. *American Oil Co.,* 262 U. S. 371.

V. The Clayton Act does not exempt the agreements involved from the anti-trust laws. *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344.

Just as this Court has held that, while owners of patents and copyrights possess special privileges, they cannot go beyond those privileges and limit resale prices without violating the Anti-Trust Act (*Standard Sanitary Co.* v. *United States,* 226 U. S. 20; see also *Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 273; *Boston Store* v. *American Graphophone Co.,* 246 U. S. 8), so, also, it has held that, while workers may organize to attain the normal and "legitimate" objects of a labor organization, they may not so extend the activities protected under § 6 of the Clayton Act as to defeat the general purposes of the anti-trust laws. *Duplex Co.* v. *Deering,* 254 U. S. 443.

The Government does not contend that the National Window Glass Workers is in itself an illegal combination. It challenges simply one provision of the agreement or understanding between the union and the National Association of Window Glass Manufacturers, and the subsequent proceedings in execution of that portion of the agreement.

VI. The intentions of the defendants when thus restraining interstate commerce are immaterial. *Addyston Co.* v. *United States,* 175 U. S. 211; *United States* v. *Patten,* 226 U. S. 525; *United States* v. *Reading Co.,* 226 U. S. 324; *Standard Sanitary Co.* v. *United States,* 226 U. S. 20; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States v. American Tobacco Co.,* 221 U. S. 106.

VII. The agreement shows on its face that it constitutes a restraint of trade in violation of the Anti-Trust Act. Under this agreement every manufacturer of hand-

blown window glass in the United States is required to keep his plant closed two-thirds of the year, no matter how great may be the demand for glass in the building industry, no matter how eager he may be to manufacture or how earnestly the men in his plant may wish to continue in his employ. *Addyston Co.* v. *United States,* 175 U. S. 211.

Mr. Pierre A. White, with whom *Mr. I. L. Bradwin, Mr. R. M. Calfee* and *Mr. A. O. Dickey* were on the brief, for National Window Glass Workers et al., appellants.

I. The wage scale under attack has not curtailed or in any way lessened the production of hand-blown window glass, and has, therefore, not restrained trade. *Nash* v. *United States,* 229 U. S. 373.

II. The creation of the two-period plan is a reasonable and necessary regulation; it is the legitimate outgrowth of the peculiar business conditions confronting the industry. *United States* v. *Reardon,* 191 Fed. 454; 6 R. C. L. 789; *Nash* v. *United States, supra; Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *United States* v. *St. Louis Terminal,* 224 U. S. 383; *Standard Sanitary Co.* v. *United States,* 226 U. S. 20; *United States* v. *Union Pacific R. R. Co.,* 226 U. S. 61; *United States* v. *Reading Co.,* 226 U. S. 324; 183 Fed. 427; *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *Chicago Board of Trade* v. *United States,* 246 U. S. 231; *United States* v. *U. S. Steel Corporation,* 251 U. S. 417; *United States* v. *Knight Co.,* 156 U. S. 1; *Anderson* v. *United States,* 171 U. S. 604; *Swift & Co.* v. *United States,* 196 U. S. 375; *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344; *National Fireproofing Co.* v. *Mason Builders' Assn.,* 169 Fed. 259.

III. The wage scale does not bind a factory to operate during only one period, but in effect fixes the period of time during which the workers in the industry will work for one group of factories and the period of time during

which the workers will work for the second group. To prevent the workers from so rationing their labor denies them a right to freedom of contract in respect to their services guaranteed to them by the Fifth Amendment. *Arthur* v. *Oakes*, 63 Fed. 310; *National Fireproofing Co.* v. *Mason Builders' Assn.*, 169 Fed. 259; *National Protective Assn.* v. *Cumming*, 170 N. Y. 315; *Grassi Co.* v. *Bennett*, 160 N. Y. S. 279; *Wunch* v. *Shankland*, 69 N. Y. S. 349; s. c. 170 N. Y. 573; *Pickett* v. *Walsh*, 192 Mass. 572; *Clemitt* v. *Watson*, 14 Ind. App. 38; *Jetton-Dekle Co.* v. *Mathew*, 53 Fla. 969; *Longshore Co.* v. *Howell*, 26 Ore. 527; *Bowen* v. *Matheson*, 14 Allen, 429; *Allgeyer* v. *Louisiana*, 165 U. S. 578; 2 Tiedeman, State and Federal Control of Persons and Property, p. 939; *In re Jacobs*, 98 N. Y. 106; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *State* v. *Kreutzberg*, 114 Wis. 530; *Erdman* v. *Mitchell*, 207 Pa. St. 79.

IV. The right to negotiate a wage scale is one of the rights guaranteed to a labor union by § 6 of the Clayton Act. The chief function of a labor union is the fixing of a wage scale covering periods of labor and wages. If the fixing of this scale is deemed a restraint of commerce, the right of labor to form and operate the labor union becomes an empty right, and § 6 of the Clayton Act is in effect vitiated and the benefits conferred by the act taken away. *Carew* v. *Rutherford*, 106 Mass. 1; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; Martin, Modern Law of Labor Unions, p. 13; *Powers* v. *Journeymen Bricklayers' Union*, 130 Tenn. 643.

V. The wage agreement in question involves manufacture only and not interstate commerce and is, therefore, beyond the regulatory power of Congress. *United States* v. *Knight Co.*, 156 U. S. 1; *Cornell* v. *Coyne*, 192 U. S. 418; *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344; *Gable* v. *Vonnegut Co.*, 274 Fed. 66; *Federal Trade Comm.* v. *Claire Furnace Co.*, 285 Fed. 936; *In re Green*, 52 Fed.

104; *Oliver Co.* v. *Lord,* 262 U. S. 172; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Kidd* v. *Pearson,* 128 U. S. 120; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Delaware, etc. R. R. Co.* v. *Yurkonis,* 238 U. S. 439; *Crescent Co.* v. *Mississippi,* 257 U. S. 129.

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding brought by the United States under the Act of July 2, 1890, c. 647, § 4; 26 Stat. 209, to prevent an alleged violation of § 1, which forbids combinations in restraint of trade among the States. The defendants are all the manufacturers of handblown window glass, with certain of their officers, and the National Window Glass Workers, a voluntary association, its officers and members, embracing all the labor to be had for this work in the United States. The defendants established a wage scale to be in effect from September 25, 1922, to January 27, 1923, and from January 29, 1923, to June 11, 1923; and the feature that is the object of the present attack is that this scale would be issued to one set of factories for the first period and to another for the second, but that no factory could get it for both, and without it they could not get labor and therefore must stop work. After a hearing a final decree was entered enjoining the defendants from carrying out the above or any similar agreements so far as they might limit and prescribe the time during which the defendant manufacturers should operate their factories for handblown window glass. 287 Fed. 228.

This agreement does not concern sales or distribution, it is directed only to the way in which union labor, the only labor obtainable it is true, shall be employed in production. If such an agreement can be within the Sherman Act at least it is not necessarily so. *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, 408. To determine its legality requires a consideration

of the particular facts. *Board of Trade of Chicago* v. *United States,* 246 U. S. 231, 238.

The dominant fact in this case is that in the last quarter of a century machines have been brought into use that dispense with the employment of the highly trained blowers and the trained gatherers needed for the handmade glass and in that and other ways have enabled the factories using machines to produce window glass at half the cost of the handmade. The price for the two kinds is the same. It has followed of course that the companies using machines fix the price, that they make much the greater part of the glass in the market, and probably, as was testified for the defendants, that the handmakers are able to keep on only by the sufferance of the others and by working longer hours. The defendants say, and it is altogether likely, that the conditions thus brought about and the nature of the work have driven many laborers away and made it impossible to get new ones. For the work is very trying, requires considerable training, and is always liable to a reduction of wages if the machine industry lowers the price. The only chance for the handworkers has been when and where they could get cheap fuel and therefore their tendency has been to follow the discoveries of natural gas. The defendants contend with a good deal of force that it is absurd to speak of their arrangements as possibly having any effect upon commerce among the States, when manufacturers of this kind obviously are not able to do more than struggle to survive a little longer before they disappear, as human effort always disappears when it is not needed to direct the force that can be got more cheaply from water or coal.

But that is not all of the defendants' case. There are not twenty-five hundred men at present in the industry. The Government says that this is the fault of the union; the defendants with much greater probability that it is the inevitable coming to pass. But wherever the fault, if

there is any, that is the fact with which the defendants had to deal. There were not men enough to enable the factories to run continuously during the working season, leaving out the two or three summer months in which the heat makes it impossible to go on. To work undermanned costs the same in fuel and overhead expenses as to work fully manned, and therefore means a serious loss. On the other hand the men are less well off with the uncertainties that such a situation brings. The purpose of the arrangement is to secure employment for all the men during the whole of the two seasons, thus to give all the labor available to the factories, and to divide it equally among them. From the view that we take we think it unnecessary to explain how the present system sprang from experience during the war when the Government restricted production to one-half of what it had been and an accident was found to work well, or to do more than advert to the defendants' contention that with the means available the production is increased. It is enough that we see no combination in unreasonable restraint of trade in the arrangements made to meet the short supply of men.

Decree reversed.
Petition dismissed.

ROOKER ET AL. *v.* FIDELITY TRUST COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 295. Motion to dismiss or affirm submitted November 26, 1923.—Decided December 10, 1923.

1. Where a judgment has been rendered, after due hearing, by a state trial court, with jurisdiction of the subject matter and parties, and affirmed by the state Supreme Court, the only resort under the

legislation of Congress, for correction of errors in deciding questions involving the Constitution, is to the appellate jurisdiction of this Court. P. 415.

2. The District Court has no jurisdiction of a suit brought there by the party who was defeated in the state courts, against his successful opponents, all citizens of the same State, to set aside the judgment as void because of errors alleged to have been committed by the state courts in deciding constitutional questions. P. 416.

3. A judge is not disqualified to sit in a case involving the duties of a corporation under a conventional trust merely because of being one of the executors and trustees to whom shares of stock in corporations holding property under like trusts have passed for administration and disposal under a will. P. 417.

Affirmed.

APPEAL from a decree of the District Court which dismissed a bill for want of jurisdiction.

Mr. Charles E. Cox, for appellees, in support of the motion. *Mr. Henry Seyfried* was also on the brief.

Mr. William Velpeau Rooker, for appellants, in opposition to the motion.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a bill in equity to have a judgment of a circuit court in Indiana, which was affirmed by the Supreme Court of the State, declared null and void, and to obtain other relief dependent on that outcome. An effort to have the judgment reviewed by this Court on writ of error had failed because the record did not disclose the presence of any question constituting a basis for such a review. *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114. The parties to the bill are the same as in the litigation in the state court, but with an addition of two defendants whose presence does not need special notice. All are citizens of the same State. The grounds advanced for resorting to the District Court are that the judgment

was rendered and affirmed in contravention of the contract clause of the Constitution of the United States and the due process of law and equal protection clauses of the Fourteenth Amendment, in that it gave effect to a state statute alleged to be in conflict with those clauses and did not give effect to a prior decision in the same cause by the Supreme Court of the State which is alleged to have become the "law of the case." The District Court was of opinion that the suit was not within its jurisdiction as defined by Congress, and on that ground dismissed the bill. The plaintiffs have appealed directly to this court under § 238 of the Judicial Code.

The appellees move that the appeal be dismissed, or in the alternative that the decree be affirmed.

The appeal is within the first clause of § 238; so the motion to dismiss must be overruled. But the suit is so plainly not within the District Court's jurisdiction as defined by Congress that the motion to affirm must be sustained.

It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 191 Ind. 141. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. *Elliott* v. *Peirsol,* 1 Pet. 328, 340; *Thompson* v. *Tolmie,* 2 Pet. 157, 169; *Voorhees* v. *Bank*

of United States, 10 Pet. 449, 474; *Cornett* v. *Williams,* 20 Wall. 226, 249; *Ex parte Harding,* 120 U. S. 782. Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, §237, as amended September 6, 1916, c. 448, § 2, 39 Stat. 726. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. Judicial Code, § 24. Besides, the period within which a proceeding might be begun for the correction of errors such as are charged in the bill had expired before it was filed, Act September 6, 1916, c. 448, § 6, 39 Stat. 726, and, as is pointed out in *Voorhees* v. *Bank of United States, supra,* after that period elapses an aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly.

Some parts of the bill speak of the judgment as given without jurisdiction and absolutely void; but this is merely mistaken characterization. A reading of the entire bill shows indubitably that there was full jurisdiction in the state courts and that the bill at best is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction.

In what has been said we have proceeded on the assumption that the constitutional questions alleged to have arisen in the state courts respecting the validity of a state statute, Acts 1915, c. 62, and the effect to be given to a prior decision in the same cause by the Supreme Court of the State, 185 Ind. 172, were questions of substance, but we do not hold that they were such,—the assumption being indulged merely for the purpose of testing the nature of the bill and the power of the District Court to entertain it.

A further matter calls for brief notice. The bill charges that the judgment of affirmance by the Supreme Court

of the State is void because one of the judges participating therein had an interest in the case which worked his disqualification. The case related to the duties and obligations of a corporation holding property under a conventional trust. The facts set forth to show the disqualification are as follows: Three of four years theretofore a citizen of the State had executed a will wherein he designated the judge as one of the executors and trustees under the will. The testator died about the time the case was submitted to the court, and the will was admitted to probate a day or two before or after the judgment of affirmance. The judge became an executor and trustee under the designation in the will. When the will was executed, and up to the time of his death, the testator owned many shares of stock in corporations holding property under trusts like that in question. The stock was to pass, and did pass, to the executors and trustees for administration and disposal under the will. The judge's relation or prospective relation to that estate and to the stocks belonging to it is the sole basis of the charge that he had a disqualifying interest in the case. We think the facts set forth and relied upon neither support nor tend to support the charge; and we experience difficulty in reconciling its presence in the bill with the care and good faith which should attend the preparation of such a pleading. Certainly the charge does not change the nature of the bill or require that it be given any effect which it otherwise would not have.

Decree affirmed.

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CUDAHY PACKING COMPANY OF NEBRASKA *v.* PARRAMORE, AS WIDOW AND GUARDIAN, ETC., ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 107. Argued November 14, 1923.—Decided December 10, 1923.

1. Agreeably to the principles sustaining state workmen's compensation laws as consistent with the Fourteenth Amendment, an employer may be required to compensate his employee for an injury of which his employment is a substantially contributory cause, though not the sole or proximate one. P. 422.
2. Whether an accident is so related to the employment that exaction of compensation may escape condemnation as clearly arbitrary and unreasonable, must depend upon the particular circumstances of the case. P. 424.
3. An employee, going to work at his employer's factory by the customary and only practicable way, was killed by a locomotive while crossing, on a public road, a railroad adjacent to the plant, a few minutes before the time when his day's service as a stationary engineer was to begin. *Held*, that imposition of liability on the employer for the benefit of the workman's dependents by a state compensation law, was constitutional. P. 426.

60 Utah, 161, affirmed.

ERROR to a judgment of the Supreme Court of Utah affirming an award of workmen's compensation by the Utah Industrial Commission.

Mr. George T. Buckingham, with whom *Mr. Thomas Creigh, Mr. R. B. Webster* and *Mr. Stephen E. Hurley* were on the brief, for plaintiff in error.

There was no employment of deceased by plaintiff in error at the time of the accident. Death did not result from an industrial accident. *In re McNicol,* 215 Mass. 497; 28 R. C. L. pp. 804, 805; *Bamberger Electric Ry. Co.* v. *Industrial Comm.,* 59 Utah, 257; *Kowalck* v. *New York Consol. Ry. Co.,* 229 N. Y. 489; *Re De Voe,* 218 N. Y. 318; *Tallon* v. *Interborough Rapid Transit Co.,* 232 N. Y. 410;

Clapp's Parking Station v. *Industrial Accident Comm.*, 51 Cal. App. 624; *Orsinie* v. *Torrance*, 96 Conn. 352.

The question to be determined is whether or not the statute as construed and applied is valid. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Merchants' National Bank* v. *Richmond*, 256 U. S. 635.

The contention that there is no evidence to support the action of the state court raises a purely legal question. *Truax* v. *Corrigan*, 257 U. S. 312; *Merchants' National Bank* v. *Richmond, supra; Jones National Bank* v. *Yates*, 240 U. S. 541.

A finding upon undisputed facts is a finding of law, even though it may be styled a finding of fact. *Bates & Rogers Co.* v. *Allen*, 183 Ky. 815; *Hochspeier* v. *Industrial Board*, 278 Ill. 523; *Glatzl* v. *Stumpp*, 220 N. Y. 71; *In re Fisher*, 220 Mass. 581.

A finding without evidence (as in this case) is beyond the jurisdiction of the Commission. It comes "under the Constitution's condemnation of all arbitrary exercise of power." *Interstate Commerce Comm.* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Bamberger Electric Ry. Co.* v. *Industrial Comm:*, 59 Utah, 257; *Clapp's Parking Station* v. *Industrial Accident Comm.*, 51 Cal. App. 624.

In determining the legal effect of facts in evidence as a deprivation of plaintiff in error's rights under the Fourteenth Amendment, "This Court must analyze the facts as averred and draw its own inferences as to their ultimate effect and is not bound by the conclusions of the State Supreme Court in this regard." *Truax* v. *Corrigan*, 257 U. S. 312.

Since the Commission was without jurisdiction, its award deprived plaintiff in error of its property without due process of law. *Scott* v. *McNeal*, 154 U. S. 34; *Interstate Commerce Comm.* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88.

The restraints of the Fourteenth Amendment bind equally judges, legislatures, executive officers. *Myles Salt*

Co. v. *Iberia Drainage District,* 239 U. S. 478; *Scott* v. *McNeal,* 154 U. S. 34; *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226; *Twining* v. *New Jersey,* 211 U. S. 78; *Ex parte Virginia,* 100 U. S. 339; Schofield, Const. Law and Equity (1921) pp. 5, 9, 21.

A judgment of a state court which deprives a person of property without due process amounts to a denial of a right secured by the Fourteenth Amendment "even if it be authorized by statute." *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478; *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226; *Scott* v. *McNeal,* 154 U. S. 34; Schofield, Const. Law and Equity, (1921), pp. 5–37.

Irrespective of the validity of the statute, the action of the Utah court was arbitrary, oppressive and unreasonable, and contrary to law, and therefore it violates the Fourteenth Amendment. *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478; *Chicago, B. & Q. R. R. Co. Chicago,* 166 U. S. 226; *Scott* v. *McNeal,* 154 U. S. 34; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530; Schofield, Const. Law and Equity (1921), pp. 5–37; *Twining* v. *New Jersey,* 211 U. S. 78; *Ex parte Virginia,* 100 U. S. 339.

This Court has uniformly upheld the constitutionality of Workmen's Compensation Acts, but solely on the principle that death or injury must be a part of the hazard of the industry. The Utah act as construed and applied extends far beyond this principle. *Arizona Employers' Liability Cases,* 250 U. S. 400; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Hawkins* v. *Bleakly,* 243 U. S. 210; *New York Central R. R. Co.* v. *White,* 243 U. S. 188.

Mr. J. Robert Robinson, Assistant Attorney General of the State of Utah, with whom *Mr. Harvey H. Cluff,* Attorney General, *Mr. William A. Hilton,* Assistant Attorney

General, and *Mr. Frederick C. Loofbourow* were on the brief, for defendants in error.

Mr. Justice Sutherland delivered the opinion of the Court.

This case arises under the provisions of the Utah Workmen's Compensation Act, which provides for the payment of compensation for personal injury or death of an employee by accident "arising out of or in the course of his employment." Compiled Laws, Utah, 1917, § 3113, and amendment, Laws, Utah, 1919, c. 63.

The Cudahy Packing Company, on August 9, 1921, and prior thereto, owned and operated a meat packing plant at a point about six miles north of Salt Lake City. Its employees generally resided in that city and in villages located north and south of the plant, only a few living in the immediate vicinity thereof.

In going to and from the plant the workmen proceeded along a main highway running north and south and passing the plant at a distance of about half a mile to the east. From this point a public road runs west to and beyond the plant, crossed, before reaching the plant, by three lines of railroad, one of which, the Rio Grande Western, lies immediately adjacent to, and from which switches lead directly into, the plant. The only practicable way of ingress and egress for employees was along this road and across these railroad tracks, and that was the way customarily used. Joseph Parramore was, and for a considerable time had been, employed at the plant at a weekly salary as a stationary engineer. He lived at Salt Lake City. On the morning of August 9, 1921, he rode to the plant in the automobile of another employee, for the purpose of going to work. The automobile crossed over two of the railroad tracks and when upon that of the Rio Grande was struck by an engine and Parramore was instantly killed. This happened about seven minutes before the time when his

service as an engineer was to begin. Upon these facts the Utah Industrial Commission awarded compensation to Parramore's dependents. The Supreme Court of the State, upon a review, affirmed the award and held that the accident was one within the terms of the statute. 60 Utah, 161.

By this construction and application of the statute we are bound and the case must be considered as though the statute had, in specific terms, provided for liability upon the precise facts hereinbefore recited. *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 510. The question saved in the state court and presented here is whether the statute, as thus construed and applied, is valid under the provisions of the Fourteenth Amendment.

Defendants in error have submitted a motion to dismiss the writ of error on the ground that no federal question is involved, but it is clearly without substance, and is overruled.

That the statute is constitutional upon its face is established by previous decisions of this Court (*New York Central R. R. Co.* v. *White,* 243 U. S. 188; *Hawkins* v. *Bleakly, Id.* 210; *Mountain Timber Co.* v. *Washington, Id.* 219; *Arizona Employers' Liability Cases,* 250 U. S. 400; *Madera Co.* v. *Industrial Accident Commission,* 262 U. S. 499) and the only inquiry we need make is whether it is constitutional as applied and enforced in respect of the facts of the instant case. See *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 288-289. It is settled by the decisions of this Court and by an overwhelming array of state decisions, that such statutes are not open to constitutional objection because they abrogate common law defenses or impose liability without fault. But the contention here, shortly stated, is that the accident was one which occurred off the premises of the employer on a public road, outside the hours of employment and while the employee was not engaged in any business of the em-

ployer; that it was not the result of any industrial risk but arose from a common peril to which the public generally was exposed; and that consequently liability is imposed arbitrarily and capriciously. It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the Constitution; but where the accident has any such relation we should be cautious about declaring a state statute creating liability against the employer invalid upon that ground. The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common law liability of the master for personal injuries to a servant, leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions. Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substan-

tially contributory though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern (*Mountain Timber Co.* v. *Washington, supra,* p. 239) to escape condemnation as arbitrary, capricious or clearly unreasonable. Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. The fact that the accident happens upon a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree.

Upon this question of causal relationship, the English decisions are instructive. In *Pierce* v. *Provident Clothing and Supply Co., Limited,* [1911], 1 K. B. 997, where a collector of the company, while riding a bicycle in the course of his employment, with the acquiescence of the company, was knocked down and killed by a tramcar, the employer was held liable because, by reason of his duties, the employee was more exposed to the risks of the streets than ordinary members of the public. In the opinion by Buckley, L. J., it is said (p. 1003): "An accident arises out of the employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind." See also *Martin* v. *J. Lovibond & Sons, Limited,* [1914], 2 K. B. 227. So where a workman was employed in a

place and under circumstances exposing him to more than ordinary risk of injury by lightning, such an injury was held to be one arising out of the employment. *Andrew* v. *Failsworth Industrial Society, Limited,* [1904], 2 K. B. 32.

In *Anderson & Co., Limited,* v. *Adamson,* 50 Scottish Law Reporter, 855, where a workman engaged during a violent gale in erecting a structure was injured by a slate blown from the roof of an adjoining building, a risk that all persons were more or less exposed to, it was held that as the workman was obliged to work in a stooping position and therefore could not see the slate coming, he was exposed beyond the normal risk, and could recover. The court said: "If it is the normal risk merely which causes the accident, the answer must be that the accident did not arise out of the employment. But if the position which the workman must necessarily occupy in connection with his work results in excessive exposure to the common risk (cf. *Ismay's* case, [1908] A. C. 437; *Rodger,* 1912 S. C. 584), or if the continuity or exceptional amount of exposure aggravates the common risk (cf. *M'Neice,* 1911 S. C. 12; *Warner* [1912] A. C. 35), then it is open to conclude that the accident did not arise out of the common risk but out of the employment."

The same doctrine has been declared, under the American statutes, by many of the state courts. See, for example: *Procaccino* v. *E. Horton & Sons,* 95 Conn. 408; *Empire Health & Accident Ins. Co.* v. *Purcell,* 76 Ind. App. 551; *Judson Manufacturing Co.* v. *Industrial Accident Commission,* 181 Cal. 300; *In re Bollman,* 73 Ind. App. 46; *Lumbermen's Reciprocal Ass'n* v. *Behnken,* (Tex.) 226 S. W. 154, [aff'd 112 Tex. 103]; *De Constantin* v. *Public Service Commission,* 75 W. Va. 32. The basis of these decisions is that under the special facts of each case the employment itself involved peculiar and abnormal exposure to a common peril, which was annexed as a risk incident to the employment.

Here the location of the plant was at a place so situated as to make the customary and only practicable way of immediate ingress and egress one of hazard. Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work; and he was in effect invited by his employer to do so. And this he was obliged to do regularly and continuously as a necessary concomitant of his employment, resulting in a degree of exposure to the common risk beyond that to which the general public was subjected. The railroad over which the way extended was not only immediately adjacent to the plant but, by means of switches, was connected with it and in principle it was as though upon the actual premises of the employer.

We attach no importance to the fact that the accident happened a few minutes before the time Parramore was to begin work and was, therefore, to that extent, outside the specified hours of employment. The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose. See *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K. B. 539, 544; *DeConstantin* v. *Public Service Commission, supra.*

In view of the facts and circumstances peculiar to this case it was fairly open to the State Supreme Court to conclude that the necessary causal relation between the employment and the accident sufficiently appeared to save it from the constitutional objection; and its judgment is accordingly.

Affirmed.

MR. JUSTICE MCKENNA, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissent.

ARNOLD, DOING BUSINESS AS R. H. ARNOLD COMPANY, ET AL. *v.* UNITED STATES FOR THE USE OF W. B. GUIMARIN & COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 31. Argued February 27, 1923.—Decided December 10, 1923.

A judgment of the Circuit Court of Appeals, in an action on a contractor's bond brought by a creditor under the Federal Materialmen's Act, which affirms the District Court in holding the action not premature and in adjudicating the amount due the plaintiff, but remands the case for jury trial of the claims of intervening creditors, and settles neither the amount of the claims to be allowed against the bond nor the proportionate share of each creditor if the bond prove inadequate to pay all, does not finally and completely dispose of the subject matter of the litigation, either as to the parties or the causes of action involved, and cannot be brought here by writ of error. P. 432.

Writ of error to review 280 Fed. 338, dismissed.

ERROR to a judgment of the Circuit Court of Appeals which modified a judgment of the District Court in an action under the Materialmen's Act, and remanded the cause for further proceedings.

Mr. William Henry White, for plaintiffs in error, submitted. *Mr. Ellwood P. Morey* and *Mr. John I. Cosgrove* were also on the briefs.

Mr. Frank G. Tompkins, with whom *Mr. M. G. McDonald* was on the brief, for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This action was brought by a subcontractor, in the name of the United States, in a Federal District Court in South Carolina, under the Materialmen's Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the

Act of February 24, 1905, c. 778, 33 Stat. 811, to recover on a contractor's bond for the construction of a naval storehouse. Judgment was had against the contractor and his surety for the full penalty of the bond. The Circuit Court of Appeals modified this judgment and remanded the cause to the District Court for further proceedings. 280 Fed. 338.

The case has been brought here by writ of error, and many errors have been assigned going to the merits of the controversy. The record, however, presents the preliminary question whether the judgment of the Circuit Court of Appeals has such finality and completeness that it may be reviewed by this Court under the writ.

The Materialmen's Act, as amended, provides [1] that the usual penal bond executed by anyone entering into a contract with the United States for the construction of any public work shall contain an additional obligation for the payment by the contractor of all persons supplying labor and materials in the prosecution of the work. Any such person not thus paid may intervene in any action instituted by the United States on the bond and obtain judgment *pro rata* with other intervenors, subject to the priority of the claim of the United States. And if no suit is brought by the United States within six months from the completion and final settlement of the contract, any such person shall have a right of action upon the bond, and may, within a specified time, bring suit against the contractor and his surety, in the name of the United States, for his use and benefit, in the federal court of the district in which the contract was performed and prosecute the same to final judgment and execution. Where suit is so instituted by a creditor, only one action shall be brought, and any creditor may file his claim therein and be made a party thereto within

[1] The amended act is set forth in full in the margin of the opinion in *Texas Cement Co.* v. *McCord*, 233 U. S. 157, 161, n. 1.

a specified time. And if the recovery on the bond is inadequate to pay the amount due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery.

The independent right of action given a materialman or laborer by the amended act, is to be enforced in a proceeding at law, and not in equity. *Illinois Surety Co.* v. *Peeler,* 240 U. S. 214, 224. All claims under the bond are to be presented in a single action, in which every claimant may intervene and be heard as a party; and this action is to proceed as a single case, in which the several claimants are not entitled to separate trials as of right, although in exceptional instances, for special and persuasive reasons, the distinct causes of action asserted by them may be made the subject of separate trials. *Miller* v. *American Bonding Co.,* 257 U. S. 304, 307, 308.

The situation presented in the present case is this: Arnold, one of the plaintiffs in error, in October, 1917, entered into a contract with the United States to construct a storehouse in the Navy Yard at Charleston, South Carolina. He executed a bond for $65,190 in conformity to the act with the Globe Indemnity Co., the other plaintiff in error, as surety.

In November, 1920, the firm of Guimarin & Co., as use plaintiff, brought this action on the bond in the Federal District Court at Charleston, against Arnold and the Indemnity Company, to recover a balance $7,725.52, with interest, alleged to be due it from Arnold under a subcontract for supplying the plumbing and other material in the storehouse. The complaint alleged that Arnold's contract with the United States had been completely performed and finally settled on April 17, 1920, and that the United States had not entered suit on the bond. The defendants answered, denying liability on

various grounds, specifically denying that Arnold's contract had been finally settled on April 17, or that more than six months had elapsed since its completion or final settlement, and averring that the court was without jurisdiction because no such final settlement had been made.[2]

Various other creditors filed intervening petitions in the case, setting up their claims; but neither the number nor the amount of these claims appears in the record.

At the hearing, in June 1921, the court held, over the defendant's objection, that the principal cause should be tried first, and that "if a breach of the bond was established" judgment could then be rendered and other claimants permitted to assert their several claims "to share in the fund thus created."[3] The case was then tried upon the issues relating to the claim of Guimarin & Co., and a verdict rendered by direction, finding that Arnold's contract had been completely performed and finally settled on April 16, 1920, and that Guimarin & Co. was entitled to recover under its subcontract $7,693.31, with interest. The court thereupon, without entering any separate judgment upon this verdict in favor of Guimarin & Co., ordered that the cause be referred to a special master to take proof and report as to the claims of intervening creditors, and entered a judgment that the United States recover of the defendants $65,190, the penalty of the bond, with costs.

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[2] Under the provisions of the amended act an action brought by a creditor before six months have expired from the time of the completion and final settlement of the principal contracts, is premature and cannot be sustained. *Texas Cement Co.* v. *McCord*, 233 U. S. 157, 163; *Illinois Surety Co.* v. *Peeler*, *supra*, p. 217.

[3] This was several months before the decision in *Miller* v. *American Bonding Co.*, *supra*. The defendants stated, at the time, that if the claims of all intervenors were not tried in the main case before the same jury, they would oppose any subsequent trial of claims not then presented on the ground that such claims would be "foreclosed."

Arnold and the Indemnity Company, before execution of the order of reference, sued out a writ of error for the review of this judgment by the Circuit Court of Appeals. There appears to have been no citation under this writ to the intervening creditors and no appearance by them in the Circuit Court of Appeals.[4]

The Circuit Court of Appeals, after disposing, adversely to Arnold and the Indemnity Company, of various assignments of error relating to the alleged prematurity of the suit and the claim of Guimarin & Co., said:

"Considering the action to be taken upon the judgment in this case, it seems to us, the same having been fully tried so far as the plaintiffs are concerned, . . . that the action of the lower court should not be disturbed in its ascertainment of the amount due plaintiffs. The court instructed the jury to find for the plaintiffs, and properly so, . . . and the judgment should be treated as that of a judgment on the bond, along with other petitioners, when judgments are rendered in their favor. The judgment . . . directing the reference to a master to pass upon the claims of the several petitioners, should be modified, and a jury trial awarded, to determine in a single trial the amounts due the several petitioners. . . . The court's idea, manifestly, in entering this judgment for the full penalty, was that, under South Carolina practice, such action constituted a forfeiture of the bond, and enabled persons in the position of the plaintiffs and the petitioners to come in and assert their claims, the aggregate not to exceed the amount of the bond, so far as the surety was concerned. . . . It is evident . . . that

[4] The record does not contain either the writ of error or the citation, but shows the entry of appearance for "the defendant in error." The Circuit Court of Appeals in its opinion refers to Guimarin & Co. as "the defendant in error"; and the citation under the present writ of error is directed only to the United States for the use of Guimarin & Co.

the court held, and meant to hold, that the contract between R. H. Arnold & Co. and the United States . . . had been fully performed, and final settlement made on the 16th day of April, 1920, and that there was due to the plaintiffs from the general contractor the sum of $7,693.31, with interest . . . , and that, suit having been instituted upon the bond in the name of the United States, suing for the use of W. B. Guimarin & Co., judgment should be entered in favor of the United States for the sum of $65,190, the penal sum of the bond . . . , to be discharged by the payment to the said Guimarin & Co. of $7,693.31, with interest . . . until paid, together with costs, . . . ; it appearing [5] that the plaintiffs' and petitioners' claims combined do not exceed the penal sum of said bond. We think the judgment as thus understood is correct and should be so modified, and that the several petitioners, upon ascertainment of the amounts respectively due them, should be entitled to like judgments; the total judgments, including that of the plaintiffs herein, not to exceed the penalty of the bond. The decision of the lower court, as herein modified, will be approved and affirmed."

Judgment was thereupon entered modifying the judgment of the District Court "as set forth in the opinion," affirming it as modified, and remanding the cause for further proceedings in accordance with the opinion.

It is evident that this judgment of the Circuit Court of Appeals does not finally and completely dispose of the subject matter of the litigation, either as to the parties or the causes of action involved. Looking to its substance, it adjudges, at the most, that the action was not prematurely brought and is to be sustained for the benefit of Guimarin & Co. and of the intervening creditors; and that

[5] The words "it appearing" are manifestly used, as the context shows, in the sense of "if it appears"; the amount of the petitioners' claims as already stated, not appearing in the record.

the defendants are liable on the bond for the amount found by the verdict to be due Guimarin & Co. and for such additional amounts as may hereafter be found, on the jury trial awarded, to be due the intervening creditors, the aggregate amount of such recoveries, however, not to exceed the penalty of the bond. It does not adjudge the amounts which either Guimarin & Co. or the intervening creditors will ultimately be entitled to recover on the bond; but for these purposes remands the cause to the District Court for further proceedings. If, upon the ascertainment of the amounts due the intervening creditors, the aggregate amount of the claims of Guimarin & Co. and of the intervening creditors are less than the penalty of the bond, it is adjudged that they will be entitled to recoveries for the full amount of their claims; but if the aggregate amount exceeds the penalty of the bond they can only recover, under the express provision of the statute, *pro rata* of the amount of such penalty. In short, this judgment does not determine the ultimate amount which Guimarin & Co. may recover on the bond, the amounts which the intervening creditors may recover, or the amount of the ultimate liability of the defendants on the bond; it adjudicates neither the amount of the claims which are to be finally allowed against the fund created by the bond, nor the proportionate share of each creditor in such fund if inadequate to pay the amounts due all the creditors.

In *La Bourgogne,* 210 U. S. 95, 112, a proceeding in admiralty by the owner of a vessel for limitation of liability arising from a collision, it was held that a decree adjudging that the owner was entitled to the limitation sought, declaring that one class of claims could not be proved against the fund and remitting all questions concerning other claims for proof prior to final decree, was not a decree from which an appeal lay to this Court, since the case not only involved primarily the owner's right to limitation of lia-

bility, but "further involved the nature and amount of claims which were to be allowed against the fund," which had not been finally disposed of by the decree. So here, the action brought by Guimarin & Co. involves not merely the liability of the defendants on the bond, but also the amount of the claims which may be allowed against the fund created by the bond, which cannot be determined until after further proceedings are had in the District Court on the remanding of the cause pursuant to the judgment of the Circuit Court of Appeals.

It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. *Hohorst* v. *Packet Co.*, 148 U. S. 262, 264; *Collins* v. *Miller*, 252 U. S. 364, 370; *Oneida Navigation Corporation* v. *Job*, 252 U. S. 521, 522; and cases therein cited.

And it is clear that the present case does not come within the seeming exception to this rule that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. See *Williams* v. *Morgan*, 111 U. S. 684, 699, and *Collins* v. *Miller, supra*, p. 371. There has been no final adjudication of the amount which Guimarin & Co. is entitled to recover on the bond; and, furthermore, its right to a recovery is not distinct from the general subject of the litigation, but involves the determination of questions affecting the intervening creditors, who are likewise parties to the suit, as well as itself, and which, under the statute, are to be determined in a single action.

For these reasons—although, as in *Oneida Navigation Corporation* v. *Job, supra,* the objection was not raised by the defendant in error[6]—the writ of error to the Circuit Court of Appeals is

Dismissed for want of jurisdiction.

BRADY, WIDOW, ETC. *v.* WORK, SECRETARY OF THE INTERIOR, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 121. Argued December 5, 6, 1923.—Decided January 7, 1924.

1. A person to whom the Land Department has adjudged the right to a tract of land is an indispensable party to a suit brought in the Supreme Court of the District of Columbia by a defeated claimant to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from issuing the patent, for want of authority. P. 437.
2. The absence of such a party from the suit is not excused by inability to obtain service, owing to his residence in a State, beyond the jurisdiction. *Id.*
3. A decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District dismissing upon a motion a bill disclosing a case in which the construction and application of an act of Congress relied on by the plaintiff were drawn in question by the defendant, is appealable to this Court under Jud. Code, § 250, par 6. *Id.*

280 Fed. 1017, affirmed.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District which dismissed the bill in a suit to enjoin the appellees from issuing a land patent.

Mr. S. M. Stockslager, with whom *Mr. Arthur Mandl* was on the brief, for appellant.

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[6]A motion to dismiss the writ of error, the consideration of which was passed to the hearing, was based on other grounds.

Mr. Solicitor General Beck and *Mr. H. L. Underwood,* Special Assistant to the Attorney General, appeared for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a bill in equity in the Supreme Court of the District of Columbia brought by Thomas N. Brady against the Secretary of the Interior and the Commissioner of the Land Office, seeking to enjoin them from issuing a patent to one Lillie S. Harner for a homestead.

The bill avers that William Rattkamner in 1913 made a homestead entry of certain public land in Arizona, that in October, 1915, Harry S. Harner filed a contest against the entry, that Rattkamner made no answer, that the register and receiver of the local land office cancelled the entry and awarded a preference right to Harner, December 27, 1918, that on January 1 the plaintiff herein, Brady, made a homestead entry of the land, and moved on to the land, that Harner made no entry under his preference right, that in February, 1919, one Rudolph Larson illegally made a homestead entry of the land, that Brady, the plaintiff, filed a contest, that Lillie S. Harner, deserted wife of Harry S. Harner, intervened in the same proceeding, that on the hearing the register and receiver recommended that Larson's entry be cancelled and that Lillie S. Harner be allowed to enter, that this was appealed from to the Commissioner of the Land Office, who affirmed the action of the register and receiver, and that thereafter Brady filed a petition for a rehearing before the Secretary of the Interior, which was denied.

The bill avers that the register and receiver, as well as the Commissioner of the Land Office and the Secretary of the Interior, violated the provisions of the Act of May 14, 1880, entitled "An act for the relief of settlers on public lands" (21 Stat. 140, c. 89), and were without authority in deciding in favor of Lillie S. Harner and proposing to issue a patent to her.

The prayer is for an injunction against the issuing of the proposed patent by the defendants.

The defendants moved to dismiss the bill on the ground that it asked the court to control the defendants in matters involving exercise of the judgment and discretion vested in them by law, and also on the ground that Lillie S. Harner was an indispensable party to this suit. This motion was granted by the Supreme Court of the District on both grounds, and that action was affirmed by the Court of Appeals.

We think the motion was properly sustained on the second ground, and do not find it necessary to discuss the first. Lillie S. Harner is the person whom the administrative officers of the Government have held to be entitled to a patent for this land. Clearly the controversy between the plaintiff and those officers involving the granting of a patent to her can not be settled without her presence in court. *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578. She is entitled to be heard. Inability to secure service on her because she lives in Arizona can not dispense with the necessity of making her a party.

Dismissal was asked also on the ground that no appeal lies in a case like this from the District Court of Appeals to this Court and that we thus have no jurisdiction. We think, however, that the bill disclosed a case in which the construction and application of the Act of May 14, 1880, were drawn in question by the defendant. By the sixth paragraph of § 250 of the Judicial Code we are required to hear an appeal in such a case.

We, therefore, can not dismiss the appeal for want of jurisdiction, but can and do affirm the action of the District Court of Appeals in affirming the decree of the Supreme Court of the District in dismissing the bill for lack of an indispensable party.

Decree affirmed.

McMILLAN CONTRACTING COMPANY ET AL. *v.* ABERNATHY ET AL.

McMILLAN CONTRACTING COMPANY ET AL. *v.* HAGERMAN.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 167 and 168. Motions to dismiss and to remand submitted October 8, 1923.—Decided January 7, 1924.

1. A case in which the jurisdiction of the District Court was invoked by the plaintiff upon the sole ground of a constitutional question, is appealable to this Court exclusively (Jud. Code, § 238); and the presence of other questions, that are not federal questions adequate in themselves to support the original jurisdiction, can afford no ground for appeal to the Circuit Court of Appeals. P. 440.
2. Where a final decree of the District Court which is reviewable only by direct appeal to this Court has been erroneously taken to the Circuit Court of Appeals, it cannot be transferred to this Court under the Act of September 14, 1922, Jud. Code, § 238a, if the time (3 months) allowed for direct appeal here from the District Court had expired when the appeal to the Circuit Court of Appeals was taken. P. 442.

Appeals to review 284 Fed. 354, remanded.

APPEALS taken to the Circuit Court of Appeals from decrees of the District Court enjoining collection of taxes, and transferred by the former court to this Court.

Mr. Justin D. Bowersock and *Mr. Arthur Miller,* for appellants, in support of the motions to remand and in opposition to the motions to dismiss. *Mr. Samuel J. McCulloch, Mr. Frank P. Barker, Mr. G. V. Head* and *Mr. Hunter M. Meriwether* were also on the briefs.

Mr. O. H. Dean, Mr. H. M. Langworthy, Mr. Roy B. Thomson and *Mr. Melville W. Borders,* for appellees in No. 167, in support of the motion to dismiss and in opposition to the motion to remand.

Mr. Albert S. Marley, for appellee in No. 168, in support of the motion to dismiss and in opposition to the motion to remand.

Mr. Chief Justice Taft delivered the opinion of the Court.

These were two bills in equity in the United States District Court brought by citizens of Missouri to enjoin citizens of the same State from proceeding to collect special assessments, of the necessary jurisdictional amount in each case, against complainants' lands in Kansas City for a public improvement, on the ground that the city charter and laws under which the assessments were levied were in conflict with the Fourteenth Amendment of the Federal Constitution. This was the only basis for the jurisdiction of the District Court. The bills also averred that the assessments did not comply with the laws under which they purported to be levied. The defendants in their answers, in addition to a denial of the averments upon which the relief was asked, pleaded a former adjudication of the same causes of action in a Missouri State Court.

The District Court held with the complainants that the charter and laws as carried out in levying the assessments violated the Fourteenth Amendment, overruled the plea of *res judicata* and granted the injunction as prayed. Appeals were perfected to the Circuit Court of Appeals. The appellees moved to dismiss the appeals. They contended that the jurisdiction of the appeals was exclusively in this Court. The Circuit Court of Appeals agreed with them in this but declined to dismiss the

appeals because of an Act of Congress approved September 14, 1922, c. 305, 42 Stat. 837, amending § 238 Jud. Code, by adding a new § 238a, in part as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any circuit court of appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court; . . . such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

An order was accordingly made transferring the appeals to this Court. The final decrees of the District Court were entered of record July 7, 1921. The three months in which an appeal could have been taken from that court to this expired on the following October 7 (39 Stat. 727, c. 448, § 6). The appeals to the Circuit Court of Appeals were allowed January 4, 1922.

The appellants move to remand the appeals to the Circuit Court of Appeals with direction to consider them on their merits. The appellees insist that the new § 238a does not apply to the appeals, that they were improperly transferred, and should be remanded with instructions to dismiss.

Two questions are thus presented for our decision:

1st, Did the Circuit Court of Appeals have jurisdiction of the appeals?

2nd, If not, should it have dismissed them instead of transferring them to this Court?

First. The Circuit Courts of Appeals were created by the Act of March 3, 1891, c. 517, 26 Stat. 826. The division of the appellate business between the new courts and this Court was originally provided for in §§ 5 and 6 of

that act. Their substance, with amendments not here material, is now embodied in §§ 238, 128, 239, 240 and 241 of the Judicial Code. Section 238 provides for direct appeals from the District Court to this Court in certified questions of jurisdiction of the District Court, in prize cases, and in all cases in which federal constitutional or treaty questions are involved. Section 128 gives the Circuit Courts of Appeals appellate jurisdiction in all cases other than those in which direct appeals may be taken to this Court under § 238, "unless otherwise provided by law." Except where under § 239 a question may be certified to this Court by a Circuit Court of Appeals, or when under § 240 this Court may bring up a case from the Circuit Court of Appeals by certiorari, the judgments of the Circuit Court of Appeals in cases in which jurisdiction of the District Court is dependent entirely on the diverse citizenship of the parties, in patent and copyright cases, in revenue cases, in criminal cases and in admiralty cases, are made final by § 128. Certain other cases specified in the Act of January 28, 1915, c. 22, § 2, 38 Stat. 803, amending § 128, and in the Act of September 6, 1916, c. 448, § 3, 39 Stat. 726, are also made final in the Circuit Court of Appeals. Judgments of the Circuit Court of Appeals not thus made final and in which more than $1,000 is involved, may be appealed to this Court under § 241.

The Act of 1891 was passed to relieve this Court from a discouraging congestion of business. It was evidently intended that the Circuit Court of Appeals should do a large part of the appellate business. The act was not happily drawn in defining the division of it between those courts and this Court and many difficulties have arisen. It suffices here to say that, under an unbroken line of authorities, when the plaintiff invokes the jurisdiction of the Federal District Court on the sole ground that his case is one in which a substantial federal constitutional

or treaty question arises, this Court has exclusive appellate jurisdiction thereof under § 238. *American Refining Co.* v. *New Orleans,* 181 U. S. 277, 281; *Huguley Mfg. Co.* v. *Galeton Cotton Mills,* 184 U. S. 290, 295; *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, 407; *Carolina Glass Co.* v. *South Carolina,* 240 U. S. 305, 318; *Raton Water Works Co.* v. *Raton,* 249 U. S. 552, 553; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 52.

It is said that there were two other questions involved in these present cases in the District Court in addition to the federal constitutional question, one of conformity of the assessments to the city charter and state law and the other of *res judicata.* But they were not federal questions upon which the jurisdiction of the federal trial court could rest, and therefore could furnish no ground for appeal to the Circuit Court of Appeals under § 128 or other provision of law. To avoid the exclusive appellate jurisdiction of this Court over such an appeal in constitutional or treaty questions under § 238, there must be diversity of citizenship of the parties or the other questions involved must be federal and adequate themselves to support the original jurisdiction. This was expressly ruled in *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 53; s. c. *sub nomine Farmers' Grain Co.* v. *Langer,* 273 Fed. 635; and obviously follows from the decisions in *Lovell* v. *Newman & Son,* 227 U. S. 412; *City of Pomona* v. *Sunset Telephone Co.,* 224 U. S. 330, and *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, 407.

We conclude that the Circuit Court of Appeals had no jurisdiction of the appeals in these cases and that they should have been dismissed, unless the Act of September 14, 1922, required that court to transfer them.

Second. When the Act of September 14, 1922, was passed, the three months allowed for appeals to this Court in these cases had expired. Appellees urge that even if

the act in terms must be held to apply to these cases, it would be beyond the power of Congress thus to deprive the appellees of their property in the decrees which had vested when the three months had expired.

We do not find it necessary to consider this question or the kindred one whether the Act of 1922 ought to be construed to be prospective and so not to include these appeals. We prefer to put our conclusion on a construction of the act which shall have general application and of which all litigants may have early notice. The time allowed by law for appeals from the District Court to the Circuit Courts of Appeals is in general six months (§ 11, Act of March 3, 1891, 26 Stat. 826, 829, c. 517) or double that allowed for appeals to this Court. We do not think the Act of 1922 applies to any case in which the appeal to the Circuit Court of Appeals is taken after the period for appeals to this Court has expired. Otherwise the act will enable one who negligently has allowed his right of appeal to this Court to go by, to take his appeal to the Circuit Court of Appeals and by transfer get into this Court, and thus lengthen the time for direct appeals to this Court from three to six months. This result we can not assume Congress intended.

As the appeals to the Circuit Court of Appeals were not taken within three months after the decrees appealed from were entered, that court had no power to order a transfer to this Court.

The cases are, therefore, remanded to the Circuit Court of Appeals.

TIDAL OIL COMPANY ET AL. *v.* FLANAGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 179. Motion to dismiss or affirm submitted November 19, 1923.—Decided January 7, 1924.

1. An Act of February 17, 1922, amending Jud. Code, § 237, provides: "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, reexamine, reverse, or affirm the final judgment of the highest court of a State in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

Construed, as not seeking to add to the general appellate jurisdiction of this Court, existing under prior legislation, but to permit review by writ of error of the class of cases therein mentioned, in which the defeated party claims that his constitutional rights have been violated by the judgment of the state court itself; and to permit the objection to be raised, in the state court, after the handing down of its opinion, and to be raised here even though petition for rehearing be denied by the state court without opinion. Pp. 450, 454.

2. The mere fact that a state Supreme Court decides against a party's claim of property or contract right by reversing its earlier decision of the law applicable to such cases, does not deprive him of his property without due process of law, contrary to the Fourteenth Amendment, nor amount to the passing of "any law" impairing the obligation of contracts, contrary to the contract clause of the Constitution. Pp. 450, 451.

3. This has been so often adjudged by the Court, that contentions to the contrary are without substance and a writ of error dependent on them must be dismissed for lack of jurisdiction. Pp. 450, 455.

4. Cases *distinguished* in which it has been held, that federal courts, exercising jurisdiction based on diverse citizenship, to avoid injustice, but without invoking the contract clause, may decide and enforce the state law as laid down by decisions of the state court governing when a contract was made, rather than by its later decisions; and those involving alleged impairment of contract by a

subsequent statute, in which the construction of the statute by the state court is accepted, but the existence, validity and scope of the contract, (and, therein, the meaning of the state statutes forming part of it,) and the effect upon the contract of the subsequent statute, are determined by this Court for itself. P. 451.

Writ of error to review 87 Okla. 231, dismissed.

ERROR to a judgment of the Supreme Court of Oklahoma, which affirmed with modification a judgment in favor of the present defendant in error, in his action involving the rights of the parties under conflicting deeds and agreements affecting an Indian allotment.

Mr. Edward H. Chandler and *Mr. William O. Beall,* for defendant in error, in support of the motion. *Mr. Summers Hardy* and *Mr. Thomas J. Hanlon* were also on the brief.

Mr. Preston C. West, Mr. Alexander A. Davidson, Mr. Wallace C. Franklin and *Mr. Arthur J. Biddison,* for plaintiffs in error, in opposition to the motion. *Mr. Y. P. Broome* was also on the brief.

Insofar as Tidal Oil Company is concerned, it is conceded that the writ of error may only be sustained under the Act of February 17, 1922, 42 Stat. 366, amending § 237, Jud. Code.

The record presents this situation: The parties on both sides claim through Marshall, a minor, to whom the land was allotted. On June 30, 1913, the allottee, by his guardian, entered into an agreement with one Arnold, in settlement and compromise of certain controversies existing between them relative to the ownership of the allotment. On petition filed by the guardian in the probate court of his appointment, that court approved and confirmed the agreement. The Oil Company claims as assignee of the lease, recognized and adopted by the guardian on behalf of the allottee with the approval of the proper probate court.

Under the statutes of Oklahoma, as construed by its highest court at the time the lease was so adopted and approved, the only requisite to the validity of this lease was, that it be sanctioned or approved by the probate court having jurisdiction of the guardianship. *Duff* v. *Keaton*, 33 Okla. 92; *Allen* v. *Midway Oil Co.*, 33 Okla. 91; *Cowles* v. *Lee*, 35 Okla. 159. See also *Papoose Oil Co.* v. *Swindler*, March 27, 1923, pending on rehearing and unreported.

In its decision in the present case, the state Supreme Court recognizes that guardians may lease lands of their wards for oil and gas mining purposes, provided they are made "in the manner prescribed by law and under the rules of this court which have been held to have the force and effect of a statute where the same are not in conflict with a statute," and cites its decisions in *Winona Oil Co.* v. *Barnes*, 83 Okla. 248, and *Carlile* v. *National Oil Co.*, 83 Okla. 217. In these decisions, rendered in 1921, the court had held, for the first time, and in conflict with its prior decisions, that in order for the guardian of a minor to make a valid lease on the ward's land, such leases must be put up and sold at public auction to the highest bidder.

The record shows that Marshall was a freedman allottee of the Creek Nation, and all restrictions on his allotment were removed by Act of May 27, 1908, § 1, 35 Stat. 312. The same act provides, in § 6, that such minor allottees are subject to the jurisdiction of the probate courts of Oklahoma.

So that, in determining whether or not the lease, as adopted by the guardian with approval of the probate court, was valid or invalid, the only question involved was the proper construction of the state statutes regulating the procedure in such cases in the probate courts. Necessarily, therefore, by basing its decision on the *Winona* and *Carlile Cases*, the court below followed the rule announced in those cases, rather than the rule which applied under

its decisions as they stood at the time the transaction was had. While the reasoning of the court on this point is not very clear, its effect as changing the rule of construction of the applicable state statutes cannot be disputed. This Court is not concerned with the reasoning, but with its effect. *McCullough* v. *Virginia*, 172 U. S. 102. This Court has repeatedly held that the obligation of contracts may be impaired by a change of judicial decision. *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Douglass* v. *Pike County*, 101 U. S. 677; *Anderson* v. *Santa Anna*, 116 U. S. 356; *German Savings Bank* v. *Franklin County*, 128 U. S. 526; *Los Angeles* v. *Los Angeles Water Co.*, 177 U. S. 558.

The Court has held, however, under the codes prior to the amendment of February 17, 1922, that it had no appellate jurisdiction to review this character of question on writ of error to a state court. This, as we understand it, is the rule announced in the cases cited by defendant in error, such as: *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Bacon* v. *Texas*, 163 U. S. 207; and *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114. Evidently the amendment of February 17, 1922, was for the express purpose of extending the appellate jurisdiction of this Court to cover cases involving the impairment of contract obligations by change of judicial decision in the construction of applicable statutes. This is the plain language of the act.

It is contended, in the motion to dismiss, that plaintiff in error has no right to a review under this act because the federal question, if any exists, was presented to the state court for the first time in the application for rehearing, and the application was denied without opinion. It will be observed the act specifies that the claim of a change in the rule of construction may be made at any time before final judgment is *entered*. The claim does not have to be made before judgment is *rendered*. Because of the very purpose of the act, Congress must have had in mind the distinction between the rendition of a

judgment and its entry. In the present case, as in all others that may come within the amendment, the federal question first arose when the state court rendered its decision holding void the contract which, under prior construction, was valid. With just such a situation in view, Congress evidently intended that the claim might be made at any time before the cause had been finally disposed of and closed in the state court.

There is no statute of the State specifically providing for the entry or recording of judgments of the Supreme Court. Under its rules, a case is not finally closed until the petition for rehearing has been disposed of, or the time has expired within which petition may be filed and none has been filed. The record shows that the petition for rehearing was filed within an extension of time granted by the Supreme Court, and that it was set down for oral argument, argued and submitted.

Mr. Chief Justice Taft delivered the opinion of the Court.

J. P. Flanagan sued the Tidal Oil Company and Eleanor Arnold in the District Court of Creek County, Oklahoma, to quiet his title to two tracts of land therein of eighty acres each. His title was based on a quitclaim deed of Robert Marshall, an allottee and citizen of the Creek Nation, executed in October, 1916, after Marshall had attained his majority and had been discharged from guardianship. The defendants derived their title from the same allottee, but the deed under which they claimed was made by Marshall when he was 14 years old and married, and after he had been granted majority rights by the District Court. He subsequently sought to have this deed cancelled in a suit in the same court brought by his guardian, but judgment went against him. Defendants insisted that this judgment was conclusive in the case at bar against the plaintiff as subsequent

grantee of Marshall. After this judgment, and by way of compromise, gas and oil leases and contracts to convey were made in favor of defendants or their grantors by the guardian and approved by the County Court, and these were also relied on to defeat plaintiff's title. The District Court gave judgment in favor of Flanagan for the lands and included a heavy recovery for mesne profits. The Supreme Court of Oklahoma affirmed this but somewhat reduced the amount of recovery. It held that the deed and agreements and leases under which defendants claimed were void because Marshall was a minor when they were made; that the judgment of the District Court against him and his guardian in their suit to cancel the first deed was void because it appeared on the face of the record that Marshall was then a minor and that these were allotted lands, of the title to which he could not be divested except in a Probate Court under procedure required by a state statute and not complied with. The errors here assigned are, first, that the judgment deprived the defendants of their property without due process of law contrary to the Fourteenth Amendment; and, second, that the Supreme Court of the State, in holding the judgment and confirmations of the District and County Courts to be void, reversed its previous decisions and changed a rule of property of the State upon the faith of which the deed, leases and other contracts set up by defendants were made, and thus impaired their obligation in violation of § 10, Article I, of the Federal Constitution.

A motion to dismiss is made by the defendant in error, because the federal questions were too late, in that they were raised for the first time in petitions for rehearing which the court denied without opinion. The record does not sustain this ground in respect to the objection based on the Fourteenth Amendment, because that appears in the assignment of errors filed on the appeal from

the District Court to the State Supreme Court. The assignment, however, has no substance in it. The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law. This was expressly held in the case of *Central Land Co.* v. *Laidley,* 159 U. S. 103, 112. See also *Morley* v. *Lake Shore Ry. Co.,* 146 U. S. 162, 171; *Patterson* v. *Colorado,* 205 U. S. 454, 461; *Delmar Jockey Club* v. *Missouri,* 210 U. S. 324, 335; *Bonner* v. *Gorman,* 213 U. S. 86, 91; *Milwaukee Electric Ry. Co.* v. *Milwaukee,* 252 U. S. 100, 106.

A ground for dismissal urged is that the validity of no federal or state statute or authority exercised under the United States or the State, was drawn in question in the state court on the ground of a repugnance to the Federal Constitution, and hence there is no right to a writ of error under § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, and that the only remedy available to the plaintiffs in error was an application to this Court for certiorari because they had been denied a right, title, privilege, or immunity, granted by the Federal Constitution. In answer, the plaintiffs in error invite attention to an Act of Congress of February 17, 1922, c. 54, 42 Stat. 366, again amending § 237, reading as follows:

"In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, reexamine, reverse, or affirm the final judgment of the highest court of a State in which a decision in the suit could be had, if said claim is made in said

court at any time before said final judgment is entered and if the decision is against the claim so made."

The case before us seems clearly within the foregoing. It does involve the validity of a contract, it is claimed that a change in the rule of law by the highest court of the State applicable to the contract is repugnant to the Federal Constitution, and the decision of that court was against the claim.

It has been settled by a long line of decisions,[1] that the provision of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts. The language—"No State shall . . . *pass any* . . . *law* impairing the obligation of contracts"—plainly requires such a conclusion. However, the fact that it has been necessary for this Court to decide the question so many times is evidence of persistent error in regard to it. Among the cases relied on to sustain the error, are *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Butz* v. *Muscatine*, 8 Wall. 575; *Douglass* v. *Pike County*, 101 U. S. 677; *Anderson* v. *Santa Anna*, 116 U. S. 356; *German Savings Bank* v. *Franklin County*, 128 U. S. 526; *Rowan* v. *Runnels*, 5 How. 134, 139, and *Los Angeles* v.

[1] *Commercial Bank* v. *Buckingham's Executors*, 5 How. 317, 343; *Railroad Co.* v. *Rock*, 4 Wall. 177, 181; *Railroad Co.* v. *McClure*, 10 Wall. 511; *Knox* v. *Exchange Bank*, 12 Wall. 379, 383; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 30; *Brown* v. *Smart*, 145 U. S. 454, 458; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111, 112; *Bacon* v. *Texas*, 163 U. S. 207, 221, 223; *Hanford* v. *Davies*, 163 U. S. 273, 278; *Turner* v. *Wilkes County Commrs.*, 173 U. S. 461, 63; *National Association* v. *Brahan*, 193 U. S. 635, 647; *Hubert* v. *New Orleans*, 215 U. S. 170, 175; *Fisher* v. *New Orleans*, 218 U. S. 438; *Cross Lake Shooting and Fishing Club* v. *Louisiana*, 224 U. S. 632, 638; *Ross* v. *Oregon*, 227 U. S. 150, 161; *Kryger* v. *Wilson*, 242 U. S. 171, 177; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 118; *Columbia Ry. Co.* v. *South Carolina*, 261 U. S. 236, 244.

Los Angeles City Water Co., 177 U. S. 558. These cases were not writs of error to the Supreme Court of a State. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a State prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third Article of the Federal Constitution they were empowered to do. *Burgess* v. *Seligman*, 107 U. S. 20. In such cases, as a general rule, they, in the interest of comity and uniformity, followed the decisions of state courts as to the state law, but where gross injustice would be otherwise done, they followed the earlier rather than the later decisions as to what it was. Had such cases been decided by the state courts, however, and had it been attempted to bring them here by writ of error to the State Supreme Court, they would have presented no federal question, and this Court must have dismissed the writs for lack both of power and jurisdiction. This is well illustrated by the cases of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Railroad Co.* v. *McClure*, 10 Wall. 511. In the former, bonds sued on in the Circuit Court of the United States, were collected under judgment of this Court. In the latter, like bonds sued on in a state court were held invalid, and a writ of error to the State Supreme Court was dismissed.

Other cases cited are *Louisiana* v. *Pilsbury*, 105 U. S. 278, and *Muhlker* v. *New York & Harlem R. R. Co.*, 197

U. S. 544, but in each of them a statute had been passed subsequently to the contract involved and was held to impair it. In such a case this Court accepts the meaning put upon the impairing statute by the state court as authoritative, but it is the statute as enforced by the State through its courts which impairs the contract, not the judgment of the court.

There is another class of cases relied on to maintain this writ of error. They are those in which this Court has held that in determining whether a state law has impaired a contract, it must decide for itself whether there was a contract and whether the law as enforced by the state court impairs it. It often happens that a law of the State constitutes part of the contract and, to make the constitutional inhibition effective, this Court must exercise an independent judgment in deciding as to the validity and construction of the law and the existence and terms of the contract. *Jefferson Branch Bank* v. *Skelly,* 1 Black, 436, 443; *Bridge Proprietors* v. *Hoboken Co.,* 1 Wall. 116, 145; *Wright* v. *Nagle,* 101 U. S. 791, 793; and *McGahey* v. *Virginia,* 135 U. S. 662, 667.

Then there are cases like *McCullough* v. *Virginia,* 172 U. S. 102; *Houston & Texas Central R. R. Co.* v. *Texas,* 177 U. S. 66, 76, 77; *Hubert* v. *New Orleans,* 215 U. S. 170, 175; *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362, 376, and *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S. 164, 171. In each of them the judgment of the State Supreme Court seemed from its opinion merely to be a reversal of a previous construction by it of a statute upon the faith of which the contract had been made. In fact, however, the judgment merely gave effect to an existing subsequent statute impairing the obligation of the contract which was thus a law passed in violation of Article I, § 10.

The difference between all these classes of cases and the present one wherein it is claimed that a state court judg-

ment alone, and without any law, impairs the obligation of a contract, has been carefully pointed out in *Central Land Co.* v. *Laidley,* 159 U. S. 103, 111, 112, in *Bacon* v. *Texas,* 163 U. S. 207, 221, 223, and in *Ross* v. *Oregon,* 227 U. S. 150, 161. Certain unguarded language in *Gelpcke* v. *Dubuque,* 1 Wall. 175, 206; *Butz* v. *Muscatine,* 8 Wall. 575, 583, and in *Douglass* v. *Pike County,* 101 U. S. 677, 686–687, and in some other cases, has caused confusion, although those cases did not really involve the contract impairment clause of the Constitution.

We come then to the last point made on behalf of plaintiffs in error. It may be best stated in the words of their brief. After referring to *Gelpcke* v. *Dubuque, supra, Douglass* v. *Pike County, supra, Anderson* v. *Santa Anna, supra,* and *German Savings Bank* v. *Franklin County, supra,* counsel say:

"The court has held, however, under the codes prior to the amendment of February 17, 1922, that it had no appellate jurisdiction to review this character of question on writ of error to a state court. This, as we understand it, is the rule announced in the cases cited by defendant in error, such as: *Central Land Co.* v. *Laidley,* 159 U. S. 103, *Bacon* v. *Texas,* 163 U. S. 207, and *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114.

"Evidently the amendment of February 17, 1922, to section 237 of the Judicial Code, was for the express purpose of extending the appellate jurisdiction of this court to cover cases involving the impairment of contract obligations by change of judicial decision in the construction of applicable statutes. This is the plain language of the act."

The intention of Congress was not, we think, to add to the general appellate jurisdiction of this Court existing under prior legislation, but rather to permit a review on writ of error in a particular class of cases in which the defeated party claims that his federal constitutional rights

have been violated by the judgment of the state court itself, and further to permit the raising of the objection after the handing down of the opinion. This Court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. A mere denial of the petition by the state court without opinion, is not enough. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179, 181; *Bilby* v. *Stewart,* 246 U. S. 255; *Missouri Pacific Ry. Co.* v. *Taber,* 244 U. S. 200; *St. Louis & San Francisco R. R. Co.* v. *Shepherd,* 240 U. S. 240, 241; *Consolidated Turnpike Co.* v. *Norfolk, etc. Ry. Co.,* 228 U. S. 326, 334; *Forbes* v. *State Council of Virginia,* 216 U. S. 396, 399; *McCorquodale* v. *Texas,* 211 U. S. 432, 437; *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 308; *Mallett* v. *North Carolina,* 181 U. S. 589, 592; *Pim* v. *St. Louis,* 165 U. S. 273.

It was the purpose of the Act of 1922 to change the rule established by this formidable array of authorities as to the class of cases therein described. The question in such cases could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion.

We can not assume that Congress attempted to give to this Court appellate jurisdiction beyond the judicial power accorded to the United States by the Constitution. The mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the Federal Constitution. Plaintiff's claim, therefore, does not raise a substantial federal question. This has been

decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction.

Writ of Error Dismissed.

DAYTON-GOOSE CREEK RAILWAY COMPANY *v.* UNITED STATES, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 330. Argued November 16, 19, 1923.—Decided January 7, 1924.

1. The power of Congress to regulate interstate commerce includes the power to foster, protect and control it, with proper regard for the welfare of those who are immediately concerned as well as of the public at large. P. 478.
2. Section 422 of the Transportation Act 1920, by the new section, 15a, added by it to the Interstate Commerce Act, directs the Interstate Commerce Commision: To establish rates which will enable the carriers, as a whole, or by rate groups or territories fixed by the Commission, to receive a fair net, operating return upon the property they hold in the aggregate for use in transportation (par. 2); to establish from time to time the percentage of the value of the aggregate property constituting a fair operating return, the act, however, fixing it for the years 1920 and 1921, at 5½%, with discretion in the Commission to add one-half of 1%, as a fund for adding betterments on capital account, (par. 3); and to fix, from time to time, such aggregate property value. The said § 15a provides further: That, because it is impossible to establish uniform rates on competitive traffic, adequate to sustain all the carriers needed for the business, without giving some an income in excess of a fair return, any carrier receiving such excess shall hold it as trustee for the United States, (par. 5); that such excess shall be distributed, one-half to the carrier as a reserve fund, the other half to a general railroad revolving fund, to be maintained by the Commission, (par. 6); that the carrier may use such reserve to pay dividends, interest on securities, or rent for leased roads, to the extent that its net operating income for any year is less than 6%, (par. 7); and whenever such reserve equals 5% of the value of its property, and while it so continues, the carrier's one-half of excess

income may be used for any lawful purpose, (par. 8); that the general revolving fund shall be administered by the Commission in making loans to carriers to meet expenditures on capital account, to refund maturing securities originally issued on capital account, and for buying equipment and facilities and leasing or selling them to carriers, (pars. 10–17).

Held: (a) The provisions for "recapture" and use of excess income are essential to the plan of the act, which aims for an efficient national transportation system, and therein seeks to maintain uniform rates, for all shippers, as a means of distributing traffic and avoiding congestion on the stronger railroads, while keeping the net returns of the railroads, whether strong or weak, to the varying percentages that are fair for them, respectively. P. 479.

(b) Rates which, as a body, enable all the railroads necessary to do the business of a rate section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are, in their general level, reasonable from the standpoint of the individual shipper in that section. P. 480.

(c) The statute leaves the reasonableness of each particular rate open to inquiry independently of the net return to the carrier from all. Pp. 480, 483.

(d) A railroad, however strong financially, economical in facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair, net operating income upon the value of its properties devoted to transportation. P. 481.

(e) Decisions holding that the fact that the revenue of a carrier from both local and interstate commerce gave a fair profit was irrelevant to the question whether the intrastate rates were unreasonably high or low, do not make against the use of a fair return of operating profit, as a standard of reasonableness of rates, when the issue respects the general level of all the rates received by the carrier. P. 483.

(f) The net operating profit accruing to a carrier from its whole rate structure is relevant evidence in determining whether the sum of the rates is fair to the carrier; reduction of excessive profit, as provided by the act, is tantamount to reducing the rates proportionately before collection. P. 483.

(g) Under the statute, excess income is taken in trust, and the carrier never has such a title to it as to render its recapture by the Government a taking without due process, in violation of the Fifth Amendment. P. 484.

(h) Inasmuch as the part of the excess income retained by the Government belongs equitably to neither carriers nor shippers, it may properly be devoted by the Government, as the act provides, to help the weaker railroads more effectively to discharge their public duties. P. 484.

(i) The recapture clause does not, by reducing net income from intrastate rates, invade the reserved power of the States, in violation of the Tenth Amendment, but, in view of its relation to the plan and national purpose of the act, is within the power of Congress over interstate commerce. P. 485.

(j) Absence of provision in the act itself for judicial hearing on the fairness of the return is not a constitutional objection, since the steps prescribed amount to a direct and indirect legislative fixing of rates, and resort to the courts on the question of confiscation is left open, under Jud. Code, §§ 208, 211. P. 485.

(k) Limitation of the return to 6%, on the property of a public utility, is not necessarily confiscatory. P. 486.

(l) In this case, the issue of confiscation, not having been raised in the complaining carrier's bill, is not before the Court; but, *semble*, that 8% on the property value reported by the carrier, remaining to it after paying the one-half excess income to the Commission, is not confiscatory. P. 486.

(m) To attack the return allowed, upon the ground that the property valuation upon which it was computed was too low, the bill should allege the true values. P. 486.

(n) Whether the property values reported by a carrier to the Commission, upon which its net income was calculated, were understated, is a question of fact, to be decided, primarily, at least, by the Commission, and which cannot be considered by the Court when the carrier has not invoked the Commission's decision upon it. P. 487.

287 Fed. 728, affirmed.

APPEAL from a decree of the District Court which dismissed a bill brought by the appellant Railway Company attacking the constitutionality of orders made by the Interstate Commerce Commission under the Transportation Act, and praying that the United States, the Commission and a United States district attorney be enjoined from prosecuting civil or criminal actions to enforce the orders.

Mr. Frank Andrews and *Mr. Robert J. Cary,* with whom *Mr. Robert H. Kelley* and *Mr. F. C. Nicodemus, Jr.,* were on the briefs, for appellant.

I. The property of appellant, held for and used in the service of transportation during the periods here involved, has remained at all times appellant's private property, protected as such by the Fifth Amendment.

The income produced by that property, and the revenues accruing from its use, are likewise private property and likewise protected. *Branson* v. *Bush,* 251 U. S. 182; *Cleveland, etc. Ry. Co.* v. *Backus,* 154 U. S. 439; *Omnia Co.* v. *United States,* 261 U. S. 502; *South Utah Mines* v. *Beaver County,* 262 U. S. 325; *Monongahela Co.* v. *United States,* 148 U. S. 312; *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362; *Minnesota Rate Cases,* 230 U. S. 352; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1; *Stone* v. *Farmers' Loan & Trust Co.,* 116 U. S. 307; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585.

II. The provisions of the Transportation Act for the disposition of net railway income are not a regulation of interstate commerce, but a direct taking of the private property of the carrier, and of the liberty of the use of the property of the carrier, without due process of law and without just compensation.

The dominant purposes of Congress were to release the railroads from governmental operation, and to prevent the transportation system of the country from being wrecked. See *Wisconsin R. R. Comm.* v. *Chicago, Burl. & Q. R. R. Co.,* 257 U. S. 563; Senate Committee Report No. 304, Senate Bill 3288. Congress was initiating a new and a different policy from any which had theretofore been recognized by national legislation. *New England Divisions Case,* 261 U. S. 184.

The contention urged in the Senate Committee report, *supra,* that Congress may "declare that the income

which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property," overlooks the elemental considerations of the powers of Congress under the Constitution.

A carrier has no right to collect, or to demand of the shipper, a rate that is not in and of itself reasonable for the service. The Commission has no right to fix, and Congress has no power to compel the shipper to pay, a rate that is not reasonable for the service. Nor may Congress take from the shipper for governmental purposes anything that is more than reasonable for the service. Therefore, the carrier has no right to collect an excess service charge and hold the excess as trustee for the United States. See §15a, par. 17. If the earnings of the carrier arise from reasonable charges for service rendered, such earnings are the private property of the carrier, which cannot, by congressional declaration or otherwise, be made a trust fund for the United States or for any other purpose. The taking of property of the carrier is not a regulation of commerce. Sections 5 and 6 do not regulate. They take the income of the carrier already earned, appropriate one-half of it to the Government, and limit the uses of the other half. The limitations are as much a taking of the carrier's property as the appropriation of it direct to the Government.

Whence comes the power of Congress to make this declaration of trust? The power cannot be defended on the proposition that it is only a part of the machinery for fixing rates. The excess is not to be returned to the persons who paid excessive provisional charges; and the act itself does not authorize excessive provisional charges, but directs that charges be fixed by the Commission, "in the exercise of its power to prescribe just and reasonable rates." Rate regulation cannot be indulged in to enrich the treasury of the Government. As

it has been practiced in this country, it is, in theory at least, designed to protect shippers from unreasonably high rates and to protect carriers from unreasonably low rates.

The general level of rates, state and interstate, under which appellant's earnings accrued to it between March 1, 1920, and December 31, 1921, must be assumed to be just and reasonable and may not be assumed to be excessive.

For all practical purposes, these rates were absolutely fixed by the Commission subject to the obligation of the carriers to correct maladjustments. But it is immaterial whether they were fixed or were merely authorized, because in either event they must have received the express approval of the Commission. The discretion of the Commission with respect to such administrative matters is not subject to review by the courts.

The rates and charges under which the appellant earned the income were not excessive, and there is no basis of law or fact for assuming that they were otherwise than just, fair and reasonable, except, perhaps, where the shippers in particular instances may be entitled, under the Interstate Commerce Act, to secure from the Commission an order of reparation requiring the carrier to refund any excess which the Commission may find to have existed in those cases. But the questions of whether any excess did exist, and if so how much it was, have by law been committed exclusively to the determination of the Commission. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

The restrictions placed by § 15a upon the use of the moneys thereby required to be placed in a reserve fund, constitute a taking of property under the Fifth Amendment, because an undue limitation upon the use of property is equivalent under the Constitution to a seizure of

the property. *Branson* v. *Bush,* 251 U. S. 182; *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *Kansas Gas Co.* v. *Haskell,* 172 Fed. 545; *West* v. *Kansas Gas Co.,* 221 U. S. 229; *St. Louis* v. *Hill,* 116 Mo. 527; *Spann* v. *Dallas,* 111 Tex. 350; *Carey* v. *Atlanta,* 143 Ga. 192; *State* v. *Darnell,* 166 N. C. 300; *Chicago, M. & S. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418; *United States* v. *Cress,* 243 U. S. 316; *United States* v. *Lynah,* 188 U. S. 445.

The "due process" clause of the Fifth Amendment requires equal legislation affecting generally and in like manner all those in similar circumstances, and to this extent the Fifth Amendment, which does not expressly contain an equal protection clause, is as broad as the Fourteenth Amendment, in which the principle is expressly stated. Taylor, Due Process, § 134; *Leeper* v. *Texas,* 139 U. S. 462; *Giozza* v. *Tiernan,* 148 U. S. 657; *Cass Co.* v. *Detroit,* 181 U. S. 396; *Tonawanda* v. *Lyon,* 181 U. S. 389; *Commodities Clause Cases,* 213 U. S. 366; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1; *Wilson* v. *New,* 243 U. S. 332.

A classification of carriers, for rate-fixing purposes, solely upon the basis of their net earnings, for performing a similar service under like conditions in the same territory, is arbitrary and unequal, and therefore takes property without due process, in violation of the Fifth Amendment. *Cotting* v. *Godard,* 183 U. S. 79.

The act deprives appellant of its property without due process by reason of the entire lack of provision for adjusting the actual earnings to the earnings as shown by the books shortly after the close of the annual accounting period. Sufficient account is not taken of deferred claims against the carrier, which should be charged against the surplus. *Sweet* v. *Rechel,* 159 U. S. 380; *Chicago, M. & St. P. Ry. Co.* v. *Wisconsin,* 238 U. S. 491.

III. The statute is unconstitutional as to appellant and therefore the orders entered in pursuance thereof are void

as a violation of the Tenth Amendment, because the recapture provision applies to the net income which is derived from the conduct of intrastate as well as interstate and foreign business, and operates as a limitation upon the earning power of a Texas corporation with respect to its business done wholly within that State. The proper regulation of interstate and foreign commerce by Congress and its agencies has no such real or substantial relation to high or excessive earnings on purely state business as will justify any limitation upon them by the Federal Government. *Adair* v. *United States,* 208 U. S. 161; *Mondou* v. *New York, etc. R. R. Co.,* 223 U. S. 1; *Shreveport Case,* 234 U. S. 342; *Mugler* v. *Kansas,* 123 U. S. 623; *Wisconsin Rate Case,* 257 U. S. 563; *Nathan* v. *Louisiana,* 8 How. 73; *Galveston, etc. Ry. Co.* v. *Texas,* 210 U. S. 217; *Greene* v. *Louisville, etc. R. R. Co.,* 244 U. S. 499; *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Bailey* v. *Drexel Co.,* 259 U. S. 20. *Noble State Bank* v. *Haskell,* 219 U. S. 104, distinguished. See also *Keller* v. *United States,* 213 U. S. 138.

IV. Section 15a does not levy or impose a tax and is not an exercise of the taxing power of Congress. See *New England Divisions Case,* 261 U. S. 184.

V. The orders of the Commission of January 16th and March 16th, 1922, expressly direct and require that, within a fixed time, one-half of all excess earnings, shown by the reports called for in such orders, shall be paid to the Commission, and inferentially direct and require that the other one-half of the excess earnings so shown be placed in the reserve fund contemplated by § 15a.

VI. Appellant is entitled to an injunction against the penalties and prosecutions which will be inflicted upon it and its officers if it continues its refusal to observe the directions of § 15a and of the orders of the Commission respecting the payment of money to the Commission and into a reserve fund.

VII. This record shows conclusively that the true value of appellant's property, held for and used in the service of transportation during the respective periods involved, substantially exceeded the amount upon the basis of which appellant's so-called excess earnings, have been computed. Therefore, a failure to accord relief herein would result in taking, as so-called excess earnings, portions of appellant's private property not justified or required by the terms of the act in question, without due process of law, in violation of the Fifth Amendment, even if the act be held valid for all purposes. *Southwestern Bell Tel. Co.* v. *Public Service Comm.*, 262 U. S. 276.

It is alleged in the bill that the so-called value upon which the Commission computed its claim for excess earnings was not the true value of complainant's property, and, this allegation being taken as true upon defendant's motion to dismiss the bill, it necessarily follows that the lower court erred in sustaining the motion. Foster, Federal Practice, 6th ed., § 366; *Detroit United Ry.* v. *Detroit*, 248 U. S. 429; *United States* v. *Railway Employés' Dept.*, 286 Fed. 228; *Krouse* v. *Brevard Co.*, 249 Fed. 538; *Stromberg* v. *Holley*, 260 Fed. 220.

The Commission erred in arbitrarily adopting cost of road and equipment as the true value of the complainant's property, and therefore its order based thereon is unlawful, and its enforcement should be enjoined. Value is not measured by cost. *Southwestern Bell Tel. Co.* v. *Public Service Comm.*, 262 U. S. 276; *Bluefield Water Works Co.* v. *Public Service Comm.*, 262 U. S. 679; *Georgia Ry. Co.* v. *Railroad Comm.*, 262 U. S. 625; *Smyth* v. *Ames*, 169 U. S. 546.

Mr. P. J. Farrell for the Interstate Commerce Commission.

I. The orders were made by the Commission as a procedural step deemed by it necessary and appropriate for

the purpose of enforcing, in so far as with it lies, the provisions of § 15a of the Interstate Commerce Act, but do not, in and of themselves, require appellant to pay into a reserve fund or to the Commission any sum or sums of money.

II. The requirements contained in the orders are fully supported by the authority conferred upon the Commission by the act, and are in accordance with the duties imposed upon the Commission by par. 9 of § 15a.

III. Appellant is not required by either the provisions of § 15a or the orders of the Commission to include income arising from non-carrier sources in excess net railway operating income.

IV. In *Ex parte 74*, 58 I. C. C. 220, the Commission did not fix the rates, fares, and charges for the transportation of passengers and property by railroad in the group in which appellant's railroad is located.

V. In so far as changes should be made in the valuation of appellant's property, appellant is fully protected by a provision contained in the orders of the Commission. As for any payments appellant may be required to make of claims accrued during the periods covered by the orders, appellant is fully protected by special instructions contained in the Commission's "Classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914."

Since, in the ordinary course of business, sums of money paid by a carrier on account of claims like those referred to by appellant are included in the carrier's accounts for the years, respectively, in which the payments are made, regardless of the dates upon which the claims accrue, it appears to be a reasonable assumption that there are included in the reports made to the Commission by appellant, for the periods covered by the orders of the Commission involved in this case, sums of money paid by appellant during those periods on account of claims which accrued in some prior period or periods.

VI. Income derived by appellant from intrastate traffic may properly be included in the basis upon which appellant's excess net railway operating income is computed. *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563.

VII. The provisions of § 15a relating to excess net railway operating income are constitutional and the orders of the Commission are valid.

As stated by this Court in the *Wisconsin Case, supra,* the end sought to be accomplished by Congress in framing the Transportation Act, including the provisions of § 15a, was to maintain an adequate national railway system. That this end is legitimate, and that the provisions referred to are appropriate and plainly adapted to that end, is equally clear. It will be seen that, in prescribing rates, the Commission is both authorized and required to use as a basis the aggregate value of the railroad property of the carriers held for and used in the service of transportation, as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, instead of, and as distinguished from, the value of the property of an individual carrier. It is therefore apparent that appellant's contention, that, as between appellant and the Commission, the general level of rates in the group where appellant's railroad is located must be presumed to be reasonable, is unsound and cannot be sustained.

Regardless of the power of Congress to provide for the levying and collecting of taxes, we think it is apparent that the provisions of § 15a, whose validity is called in question by appellant, may be upheld as portions of a scheme of regulation of interstate and foreign commerce which Congress has a constitutional right to create and put in force.

Mr. Solicitor General Beck, with whom *Mr. Blackburn Esterline,* Assistant to the Solicitor General, was on the brief, for the United States.

Whether an adequate system of railway transportation throughout the continental United States shall be maintained and, to that end, whether the Transportation Act is a valid exercise of congressional power, is the question. Whether a particular clause of that act is constitutional when torn from its setting, is decidedly not the question.

The act stands before the Court with all of the presumptions of validity. *Nicol* v. *Ames,* 173 U. S. 509. Moreover, it has thrice been sustained in practically all of its aspects. *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563; *Pennsylvania R. R. Co.* v. *Railroad Labor Board,* 261 U. S. 72; *New England Divisions Case,* 261 U. S. 184.

The appellant alleges itself to be a common carrier by railroad subject to the lawful provisions of the Transportation Act and all other lawful acts of Congress regulating railroads engaged in interstate and foreign commerce. Congress, therefore, has the power to regulate it. *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136; *Atlantic Coast Line R. R. Co.* v. *Riverside Mills,* 219 U. S. 186.

The broad purposes of the Transportation Act are repeatedly recited throughout the act. 41 Stat. 476, 477, 482, 488, 489, 491. [Counsel reviewed the history of the times under which Congress acted and the legislative history of the Transportation Act. See *Stafford* v. *Wallace,* 258 U. S. 513.] The Congress was avowedly considering the transportation system throughout the continental United States as a whole. To hold that the Congress enacted the broad provisions to raise revenue, to prescribe divisions, to provide for settlement of disputes between carriers and their employees, and for other equally important purposes, in order to maintain an adequate transportation system, and then to annul and strike down the standard or basis for which these enormous increased revenues are to be raised and equitably distributed or

placed, would defeat the whole intention of the Congress and bring about a situation more destructive to the public interest than if no part of the act had ever been passed.

Never in its history has Congress enacted a statute in which the sections were so closely interlocked and dependent each upon the other. If paragraphs 5 and 6 of § 422 are torn from the body of the act, the whole foundation of the entire legislative scheme fails.

In cases thus far decided, both the District Courts and this Court, in approaching the subject, have persistently exercised the judicial power with a scope coextensive with the congressional enactment, and have kept the entire act and all of the carriers subject thereto in full view at all times, to the end that all of the incidents to the development of an adequate transportation system may move forward at once and together. The statute is not to be interpreted and executed along restricted and narrow lines when dealing with such a complex and stupendous subject.

In *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, paragraphs 3 and 4 of § 13, and § 15a, were assailed, but this Court sustained the validity of the act in all respects. See also *Pennsylvania R. R. Co.* v. *Railroad Labor Board,* 261 U. S. 72; *New England Divisions Case,* 261 U. S. 184.

The proceedings before the Commission and in the District Court, the arguments in the briefs of counsel and at the bar, and the opinion of this Court, all show that § 15a, practically in its entirety, was involved in the *New England Divisions Case.* What this Court said concerning the so-called "recapture clause", and other paragraphs of that section, was not inadvertence, but squarely within the issues made by the parties. To sustain the contentions or any substantial part of them, now advanced by appellant and the numerous *amici curiæ,* would be to overrule the *New England Divisions Case.* The opinion in that case is just as conclusive

of the validity of the recapture paragraphs as if those paragraphs had been the immediate subject of the controversy instead of the so-called divisions paragraphs. The Commission there considered the respective needs of the several carriers in the distribution of the revenue, after it was acquired by the carriers and before the net railway operating income reached 6% of the value of the railway property held for and used by each carrier in the service of transportation. In the instant case the net has exceeded 6%. The constitutional rights of the complainant under the Transportation Act have thus been fully satisfied. The whole controversy is over the overflow. Thus, the questions disposed of in the *New England Divisions Case* reached heights far beyond anything now claimed by the appellant and the *amici curiae* under the recapture clause. If the Congress may authorize the Commission to direct the distribution among the weaker lines of much needed earnings to maintain an adequate transportation system, *a fortiori,* it may direct the recapture of excess earnings of those who have waxed fat under the Transportation Act. Swollen earnings derived from necessarily general rates for transportation, which the public must pay, are not guaranteed by the Constitution.

Paragraphs 5 and 6 may not be segregated from the paragraphs which have already been upheld. *Hill* v. *Wallace,* 259 U. S. 44; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540.

It cannot seriously be argued that paragraphs 3 and 4 of § 13, paragraph 6 of § 15, and § 15a, of the Interstate Commerce Act, as amended by the Transportation Act, are not integral parts of the machinery; that is, the raising of the revenues, the fixing of the divisions, and the recapture of the excess earnings, all stand together. Opposing counsel, therefore, are wedged between the nonsegregation of these several paragraphs,

on the one side, and the opinions of this Court in the *Wisconsin Rate Case* and the *New England Divisions Case*, on the other side.

Moreover, it is conceded that paragraphs 2, 3, and 4 of § 15a undoubtedly constitute a regulation of commerce. The argument is that unconstitutionality begins at the point at which the so-called constitutional guaranty stops.

The Commission has found the value of the steam railway property subject to the act and held for and used in the service of transportation at approximately $18,900,000,000. *Ex parte 74*, 58 I. C. C. 229. The exercise of the power of Congress, which authorizes the Commission to increase rates to the public, so as to earn a net return to each carrier of 6% on the valuation, cannot in this proceeding be successfully challenged as confiscatory. The act was passed in the public interest, which includes the interest of the carriers. *Interstate Commerce Comm.* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 109; *Minnesota Rate Cases*, 230 U. S. 441, 467, 471.

There are those who contend that, if all the railroads were placed in a single system, it would be unconstitutional for Congress to impose upon them a scheme of rates which would yield less than a fair return upon the aggregate value; that the instant case is not different in principle because of the separation of the railroads into different systems; therefore the recapture clause is invalid, because it takes from some roads part of their earnings and leaves to the roads in the aggregate less than the fair return upon the property in the aggregate. Congress deals with the situation as it finds it. With the railroads divided into separate systems, there is no constitutional obligation on Congress to make rates which will yield and leave in the hands of the railroads in the aggregate a fair return on the aggregate value.

Again, it has been said that the true rate-making rule is to make rates upon the basis of the average results of

all the carriers, and anything that any carrier earns under this rule is its property and cannot be taken away. Courts will not limit in this way the right of Congress to select the means of exercising its constitutional powers; nor will they declare that any given rule of rate making is the only rule. There is no reason for the courts to say that Congress is prohibited from adopting some other rule of rate making, as, for example, that rates on prosperous roads shall be only such as will yield them a fair return; in which event competition would force corresponding rates on the weak roads.

It has also been suggested that Congress has not the power to bankrupt the railroads by fixing rates for the prosperous roads which, while constitutional as to them, would, through competitive influences, leave other roads without a fair return. There can be no such operation of the constitutional principle. The Government might buy and operate a railroad between Chicago and New York and might charge exceedingly low rates. This might be disastrous to other railroads, but how could it be said that their property had been taken by legislative enactment without due process of law merely because they, as the result of competition, had been unfavorably affected by an act of the Government which in itself would be entirely lawful?

The Transportation Act was designed to help the transportation situation, and did help it. If the railroads had gone back to private control without the specific rate-making rule prescribed in the Transportation Act, the railroads could not have increased their rates to anything like the extent they were permitted to increase them under the Transportation Act. If the more fragmentary rules which had theretofore been applied had been applied to the new situation, it is perfectly clear that the net increase would have been much smaller. It would be surprising if a rule which was intended to be more liberal

in practice to the railroads, and which in fact was more liberal to them, should be regarded as unconstitutional, when the rules theretofore in effect of a more fragmentary character and affording less protection to the carriers would be regarded as constitutional.

If there are any carriers which have a constitutional right to object to the rule of the Transportation Act, they are the weaker carriers, because the act makes it practically certain that rates will not be high enough to give them a fair return. But those carriers are not objecting, and in the nature of things will not object, because the rule gives them more than they would otherwise get in practice. And it is impossible to see how carriers which are getting more than they are constitutionally entitled to, can say that the rule that gives them that amount is unconstitutional.

Decisions are legion, and Congress took notice of them in enacting the Transportation Act, on the subject of the right of carriers to earn a fair return on the value of the property used in the service of the public. See *Chicago, M. & S. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418; *Reagan* v. *Farmers' L. & T. Co.,* 154 U. S. 362; *Smyth* v. *Ames,* 169 U. S. 466; *Galveston Elec. Co.* v. *Galveston,* 258 U. S. 388; *Minnesota Rate Cases, supra.* Likewise with respect to the classification of railroads. *Chicago, B. & Q. R. R. Co.* v. *Iowa,* 94 U. S. 155; *Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339; *Dow* v. *Beidelman,* 125 U. S. 680. Each individual case must rest upon its own peculiar facts and circumstances. *Covington, etc. Co.* v. *Sandford,* 164 U. S. 578.

The principle upon which the recapture clause was founded was not unknown to our law. See *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

Counsel argue that the statutory half-and-half division between the Government and the company of the excess

earnings is arbitrary, and that, if sustained, it might subsequently be revised, and the proportion of the company from time to time be so reduced as to reach zero. Similar arguments in other cases have been rejected as irrelevant. *Atlantic Coast Line R. R. Co.* v. *Corporation Comm.*, 206 U. S. 1; *Noble State Bank* v. *Haskell*, 219 U. S. 104.

Likewise the argument may not prevail that appellant, owing to claims and suits for loss and damage, overcharges, etc., may not close records and submit reports of earnings for a specified year because of undetermined liability, as it presents a general administrative question which clearly belongs to the rules and regulations of the Interstate Commerce Commission covering such matters. The Court would not determine such questions in advance of the facts of the particular case.

Opposing counsel try to make much of the language of the District Court that the recapture of the excess earnings was in the nature of a tax. One of the briefs points out that the Interstate Commerce Commission has not become a tax assessor and collector, that, as the moneys are not paid into the Treasury by the carriers and paid out by the Treasurer, there is no tax, hence the District Court erred. The tax referred to in the *New England Divisions Case*, is very much the same as the tax referred to in the *Mountain Timber Case*. The point does not require further discussion.

There is little in the briefs of opposing counsel which meets the holding of the District Court that appellant never acquired title to the fund as its absolute property but that it holds the same as trustee for the United States.

The Transportation Act does not interfere with intrastate commerce. *Wisconsin Rate Case*, 257 U. S. 587.

Mr. Samuel W. Moore, by leave of Court, filed a brief for the Kansas City Southern Railway Company, as *amicus curiae*.

Messrs. Joseph Paxton Blair, Edgar H. Boles, John F. Bowie, Robert J. Cary, Henry W. Clark, Herbert Fitzpatrick, Lawrence Greer, W. S. Horton, William S. Jenney, E. W. Knight, Richard V. Lindabury, Will H. Lyford, Samuel W. Moore, William Church Osborn, Winslow S. Pierce, Henry V. Poor, John H. Agate and *Carl A. de Gersdorff,* by leave of Court, filed a brief for the numerous railroad companies named in the footnote, *post,* 475, as *amici curiae.*

Mr. Winslow S. Pierce, Mr. Lawrence Greer and *Mr. F. C. Nicodemus, Jr.,* by leave of Court, filed a brief for the Wabash Railway Company, the Western Maryland Railway Company, and the St. Louis Southwestern Railway Company, as *amici curiae.*

Mr. John G. Milburn and *Mr. Forney Johnston,* by leave of Court, filed a brief for the National Association of Owners of Railroad Securities, as *amici curiae.*

Mr. Chief Justice Taft delivered the opinion of the Court.

The main question in this case is whether the so-called "recapture" paragraphs of the Transportation Act of 1920, c. 91, § 422, § 15a, paragraphs 5–17, 41 Stat. 456, 489–491, are constitutional.

The Dayton-Goose Creek Railway Company is a corporation of Texas, engaged in intrastate, interstate and foreign commerce. Its volume of intrastate traffic exceeds that of its interstate and foreign traffic. In response to orders of the Interstate Commerce Commission, the carrier made returns for ten months of 1920, and for the full year of 1921, reporting the value of its railroad property employed in commerce and its net revenue therefrom. It earned $21,666.24 more than six per cent. on the value of its property in the ten months of 1920, and $33,766.99

excess in the twelve months of 1921. The Commission requested it to report what provision it had made for setting up a fund to preserve one-half of these excesses, and to remit the other half to the Commission.

The carrier then filed the present bill, setting forth the constitutional invalidity of the recapture provisions of the act and the orders of the Commission based thereon, averring that it had no adequate remedy at law to save itself from the irreparable wrong about to be done to it by enforcement of the provisions, and praying that the defendants, the United States, the Interstate Commerce Commission, and the United States District Attorney for the Eastern District of Texas, be temporarily restrained from prosecuting any civil or criminal suit to enforce the Commission's orders, and that the court on final hearing make the injunction permanent. The Commission answered the bill. The United States and the District Attorney moved to dismiss it for want of equity jurisdiction, and for lack of equity. An application for an interlocutory injunction before a court of three judges under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220, was denied and the court, proceeding to consider the equities, dismissed the bill.

The question of equity jurisdiction raised below has not been discussed here by counsel for the appellees either upon their briefs or in oral argument. They do not rely on it, but seek without delay a decision on the merits.

While the Dayton-Goose Creek Railway Company was the sole complainant below and is the sole appellant here, nineteen other railway companies have, as *amici curiae*, upon leave granted, filed briefs in support of its appeal. Their names appear in the margin.[1]

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[1] Southern Pacific Company; Lehigh Valley Railroad Company; Western Pacific Railroad Corporation; New York Central Railroad Company; Union Pacific Railroad Company; Chesapeake & Ohio Railway Company; Western Maryland Railway Company; Illinois

By § 422 of the Transportation Act, there was added to the existing Interstate Commerce Act and its amendments, § 15a. The section in its second paragraph directs the Commission to establish rates which will enable the carriers, as a whole or by rate groups or territories fixed by the Commission, to receive a fair net operating return upon the property they hold in the aggregate for use in transportation. By paragraph 3, the Commission is to establish from time to time and make public the percentage of the value of the aggregate property it regards as a fair operating return, but for 1920 and 1921 such a fair return is to be five and a half per cent., with discretion in the Commission to add one-half of one per cent. as a fund for adding betterments on capital account. By paragraph 4, the Commission is to fix the aggregate value of the property from time to time, using in doing so the results of its valuation of the railways as provided in § 19a of the Interstate Commerce Act, so far as they are available, and all the elements of value recognized by the law of the land for rate-making purposes, including so far as the Commission may deem it proper, the investment account of the railways.

Paragraph 5 declares that, because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers needed to do the business, without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it in the manner thereafter prescribed as trustee for the United States. Paragraph 6 distributes

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Central Railroad Company; Delaware, Lackawanna & Western Railroad Company; Virginian Railway Company; Duluth, Missabe & Northern Railway Company; Chicago & Eastern Illinois Railway Company; Kansas City Southern Railway Company; El Paso & Southwestern Railroad Company; St. Louis Southwestern Railway Company and Wabash Railway Company; Pere Marquette Railway Company; New York, Chicago & St. Louis Railroad Company; and the New Orleans, Texas & Mexico Railway Company.

the excess, one-half to a reserve fund to be maintained by the carrier, and the other half to a general railroad revolving fund to be maintained by the Commission. Paragraph 7 specifies the only uses to which the carrier may apply its reserve fund. They are the payment of interest on bonds and other securities, rent for leased lines, and the payment of dividends, to the extent that its operating income for the year is less than six per cent. When the reserve fund equals five per cent. of the value of the railroad property, and as long as it continues to do so, the carrier's one-half of the excess income may be used by it for any lawful purpose. Under paragraph 10, and subsequent paragraphs, the general railroad revolving fund is to be administered by the Commission in making loans to carriers to meet expenditures on capital account, to refund maturing securities originally issued on capital account and for buying equipment and facilities and leasing or selling them to carriers.

This Court has recently had occasion to construe the Transportation Act. In *Wisconsin R. R. Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, it was held that the act in seeking to render the interstate commerce railway system adequate to the country's needs had, by §§ 418 and 422, conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. In the *New England Divisions Case,* 261 U. S. 184, it was held that under § 418 the Commission in making division of joint rates between groups of carriers might in the public interest consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.

In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. *The Daniel Ball,* 10 Wall. 557, 564; *County of Mobile* v. *Kimball,* 102 U. S. 691, 696, 697; *California* v. *Pacific R. R. Co.,* 127 U. S. 1, 39; *Wilson* v. *Shaw,* 204 U. S. 24, 33; *Second Employers' Liability Cases,* 223 U. S. 1, 47; *Luxton* v. *North River*

Bridge Co., 153 U. S. 525, 529. Mr. Justice Bradley, speaking for the Court in *California* v. *Pacific R. R. Co.* (p. 39), said:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. . . . This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. . . . But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service.

Title IV of the Transportation Act, embracing §§ 418 and 422, is carefully framed to achieve its expressly declared objects. Uniform rates enjoined for all shippers will tend to divide the business in proper proportion so that, when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and congestion would follow. The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn more must hold one-half of the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and

unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

First. Rates which as a body enable all the railroads necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. He with every other shipper similarly situated in the same section is vitally interested in having a system which can do all the business offered. If there is congestion, he suffers with the rest. He may, therefore, properly be required in the rates he pays to share with all other shippers of the same section the burden of maintaining an adequate railway capacity to do their business. This conclusion makes it unnecessary to discuss the question mooted whether shippers are deprived of constitutional rights when denied reasonable rates.

It should be noted that, in reaching a conclusion, upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. Paragraph 17 of § 15a, makes this clear:

"The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section."

This last clause only prevents the shipper from objecting to a particular rate otherwise reasonable, on the ground that the net return from the whole body of rates is in excess of a fair percentage of profit, a circumstance that was never relevant in such an inquiry, as hereafter shown.

Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he can not expect either high or speculative dividends but that his obligation limits him to only fair or reasonable profit. If the company owned the only railroad engaged in transportation in a given section and was doing all the business, this would be clear. If it receives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no better net return? Classification of railways in the matter of adjustment of rates has been sustained in numerous cases. In the *Minnesota Rate Cases*, 230 U. S. 352, 469, 473, it was held that the rates imposed by the State upon two railways were not confiscatory but that they were so in

the case of a third railway performing service in the same territory, because the latter was put to greater expense in rendering the service. An injunction was refused to the first two railways and was granted to the third. The same principle has been upheld in analogous cases. *Chicago, Burlington & Quincy R. R. Co.* v. *Iowa,* 94 U. S. 155; *Dow* v. *Beidelman,* 125 U. S. 680; *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 549, 551; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 599, *et seq.*

It is argued that to cut down the operating profit of the stronger roads to a certain per cent. is not cutting or reducing rates, since the net income of a carrier has no proper relation to rates and can not be used as evidence of their reasonableness. *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, and *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* 222 U. S. 541, are cited to this point. They merely decide that where the reasonableness of one rate or a class of rates is in issue, the total operating profit of the railroad or public utility is of little use in reaching a conclusion. This is shown by the words of Mr. Justice Lamar, speaking for the Court, in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* (p. 549):

"Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article."

There is nothing in the act requiring the use of the net return as evidence to fix a particular rate. As we have already pointed out, paragraph 17, § 15a, gives fullest latitude for evidence on such an issue.

Reliance is also had on decisions of this Court in cases where the question was of the reasonableness of state rates, and it was held that evidence to show that the revenue of the carrier from both state and interstate commerce gave a fair profit, was not relevant. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and on the other hand the carrier can not justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business. *Minnesota Rate Cases,* 230 U. S. 352, 435; *Smyth* v. *Ames,* 169 U. S. 466, 541. But this conclusion does not make against the use of a fair return of operating profit as a standard of reasonableness of rates when the issue is as to the general level of all the rates received by the carrier.

The reduction of the net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair.

We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation, that the income it receives for the use of its property is as much protected by the Fifth Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the Government a taking without due process.

It is then objected that the Government has no right to retain one-half of the excess, since, if it does not belong to the carrier, it belongs to the shippers and should be returned to them. If it were valid, it is an objection which the carrier can not be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the Government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties. Indirectly and ultimately this should benefit the shippers by bringing the weaker roads nearer in point of

economy and efficiency to the stronger roads and thus making it just and possible to reduce the uniform rates.

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the States and is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. *Minnesota Rate Cases,* 230 U. S. 352, 432, 433; *Illinois Central R. R. Co.* v. *Behrens,* 233 U. S. 473, 477; *The Shreveport Case,* 234 U. S. 342, 351; *Illinois Central R. R. Co.* v. *State Public Utilities Comm.,* 245 U. S. 493, 506; *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563. The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable.

It is further objected that no opportunity is given under § 15a for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed in the act constitute a direct and indirect legislative fixing

of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under §§ 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287.

The act fixes the fair return for the years here involved, 1920 and 1921, at five and a half per cent. and the Commission exercises its discretion to add one-half a per cent. The case of *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U. S. 679, is cited to show that a return of six per cent. on the property of a public utility is confiscatory. But six per cent. was not found confiscatory in *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 48, 50; in *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655, 670; or in *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 172. Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances. Here we are relieved from considering the line between a fair return and confiscation, because under the provisions of the act and the reports made by the appellant the return which it will receive after paying one-half the excess to the Commission will be about eight per cent. on the reported value. This can hardly be called confiscatory. Moreover the appellant did not raise the issue of confiscation in its bill and it can not properly be said to be before us.

It is also said in argument that the value of the carrier's property upon which the net income was calculated was too low and was unfair to the carrier. The value of property, it is argued, really depends on the profit to be expected from its use, and should be calculated on the income from rates prevailing when the law was passed which

must be presumed to have been reasonable. The true value of the carrier's property would thus be shown to be so much higher than reported, that the actual return would be not higher than six per cent. of it and there would be no excess.

We do not think that, with the record as it is, such an argument is open to the appellant. It did allege that the values upon which the return was estimated were not the true values, but it did not allege what the true values were. This was not good pleading and did not properly tender the issue on the question of value. Under orders of the Commission, the carrier itself reported the values of its properties for 1920 and 1921, upon which the excesses of income were calculated. The bill averred that a return of these particular values was required under the orders of the Commission. This statement is not borne out by the orders themselves. They gave the carrier full opportunity to report any other values and to support them by evidence. This it did not do. We can not consider an issue of fact that was primarily at least committed by the act to the Commission, when the carrier has not invoked the decision of that tribunal.

The decree of the District Court is affirmed.

QUEEN INSURANCE COMPANY OF AMERICA v. GLOBE & RUTGERS FIRE INSURANCE COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 116. Argued December 6, 1923.—Decided January 7, 1924.

1. Clauses in a marine insurance policy excepting, "all consequences of hostilities or warlike operations," and in a war risk insurance policy insuring against acts "authorized by and in prosecution of hostilities," should be construed narrowly as applicable only where warlike acts or operations are the proximate cause of a loss. P. 492.

2. There are special reasons for construing such policies in harmony with the marine insurance law of England. P. 493.
3. Where the cargo lost was all contraband, shipped in an Italian steamship from this country to Italy during the late war, and consisted in part of supplies and munitions for the Italian Government, and where the loss occurred while the vessel was in a convoy sailing with screened lights, protected by British, Italian and American war vessels and subject to the command of a naval officer, and resulted from a collision with a British steamship in another convoy similarly commanded which met the first one in the dark,—*held*, that the loss was not attributable to warlike operations, within the meaning of the above exception. P. 491.

282 Fed. 976, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a libel upon an insurance policy.

Mr. Oscar R. Houston, with whom *Mr. D. Roger Englar* and *Mr. George S. Brengle* were on the brief, for petitioner.

I. The loss was a proximate result of "acts of kings in prosecution of hostilities."

The lower courts reached their conclusions, not on principle, but out of deference to the decision of the House of Lords in the cases of *The Matiana* (1921) 1 A. C. 99; s. c. (1919) 1 K. B. 632; (1919) 2 K. B. 670; and *The Petersham* (1921) 1 A. C. 99; s. c. (1919) 1 K. B. 575. [Discussing also *The St. Oswald* (1918) 2 K. B. 879; *The Ardgantock* and *The Richard de Larrinaga* (1921) 2 A. C. 141; s. c. (1920) 1 K. B. 705; *The Bonvilston* and *Geelong* (1923) A. C. 191; *The Warilda* (1923) A. C. 292.]

Under these decisions, if two ships (whether privately operated or under requisition) traveling at night at full speed, without lights, in accordance with Admiralty instructions, come into collision, without either being at fault, then, if both are carrying commercial cargoes, the loss falls upon marine underwriters, *The Petersham, supra*; but if either is carrying government stores to a war base,

the loss falls upon war risk underwriters, even though the character of the cargo in no way affects the navigation of the vessels. *The Bonvilston, supra.* If a merchant ship carrying a commercial cargo comes into collision with a warship, then, if both ships are at fault, or if neither is at fault, or if the warship alone is at fault, the loss falls upon war risk underwriters, *The Ardgantock* and *The Warilda, supra;* even though the warship is not actually performing any naval duty but is merely proceeding to some port where she intends to take up naval operations. *The Richard de Larrinaga, supra.* But if the merchant ship alone is negligent, the loss falls on marine underwriters. *Charente S. S. Co.* v. *Director of Transports,* 38 T. L. R. 148.

The above distinctions disregard the real substance of the issues. The intent of all parties is that marine underwriters during war shall continue to bear the same risks they bore in times of peace, and that new risks brought about by war are specially insured at a higher premium. This intent is wholly defeated by making the character of the cargo of either vessel determine upon which set of underwriters the loss will fall, or by treating a collision with escorting warships as falling upon a different set of underwriters from a collision with one of the escorted ships. The proper test is to look at the efficient, dominating, or proximate cause. Was the collision the result of the ordinary causes of collision, such as faulty navigation, fog, neglect of sailing rules, etc., or was it the result of the act of the naval authorities in sending two fleets of ships, in close formation, showing no lights, on courses which met, without warning either fleet of the impending approach of the other? See (1921) 1 A. C. 135. The naval authorities by their handling of the convoys created a new risk, as part of the general plan for prosecuting hostilities, and it was this new risk that was the proximate cause of the collision. Cf. *The Canadia,* 246 Fed. 759; *The Llama,* 291 Fed. 1.

II. Merchant ships sailing in convoy are engaged in a warlike operation, under American law. *The Atalanta*, 3 Wheat. 409; *The Nereide*, 9 Cr. 388; *The Ship Galen*, 37 Ct. Clms. 89; *The Schooner Nancy*, 27 Ct. Clms. 99; *The Black Sea Nymph*, 36 Ct. Clms. 369; Woolsey, Int. Law, 4th ed., § 193; 1 Kent Com., 4th ed., § 155; 7 Moore, Int. Law Dig., p. 494.

III. There is no commercial necessity requiring the American courts to follow the British decisions.

Mr. Van Vechten Veeder, with whom *Mr. Charles C. Burlingham* was on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel in admiralty upon a New York policy insuring cargo on the Italian steamship Napoli lost by collision in the Mediterranean, in or near the Gulf of Lyons, on July 4, 1918. The libellant also in New York had insured the cargo concerned against marine risks and the libellee had insured it against war risks. Each company by agreement paid half the loss subject to adjustment and took an assignment of the claim of the assured against the other. The main question in the case is whether the loss was covered by the libellee's policy as the libellant contends. We were asked to assume that the exception of "all consequences . . . of hostilities or warlike operations" in the marine policy and the liability for "acts of kings, princes and people authorized by and in prosecution of hostilities between belligerent nations" assumed by the libellee were coextensive. For the purposes of argument we shall do so. The Courts below in deference to the English decisions held that the loss could not be attributed to warlike operations. There was a difference of opinion as to whether the collision was due to faulty navigation, but all the judges agreed that it was expedient to follow the English law. 278 Fed. 770. 282 Fed. 976.

It will not be necessary to state the facts in detail. They are fully set forth in the decisions below but those that are material to our conclusion need but a few words. The Napoli sailed from New York for Genoa with a cargo of which a part was intended for the Italian Government and a small part was munitions of war. All of it was contraband. At Gibraltar she joined a convoy, as it was practically necessary to do although not ordered by the military powers. The convoy sailed with screened lights, protected by British, Italian and American war vessels, and navigated by an Italian commander on the Napoli, subject to the command of a British captain as the senior naval officer present. The route to be followed was ordered beforehand up to a point where instructions from Genoa were to be received but were not, as the convoy was ahead of the scheduled time. At about midnight July 4 another convoy similarly commanded met this one head on. It was seen only a very few minutes before the meeting, there was much confusion, and one of its vessels, the Lamington, a British steamship, struck the Napoli and sank her. As our judgment is based on broader grounds, we do not describe the movements bearing upon the nice question whether the navigation of the Napoli or the Lamington was in fault.

To show that the loss is to be attributed to warlike operations, the petitioner points to sailing under convoy and without lights, both made necessary by the war, as enough. To this it adds that the cargo of the Napoli was an aid in carrying on the struggle, a matter of special importance in the late war, where the issue depended so largely on supplies, where, as it was put by Hough, J., below, "commerce existed only as an adjunct to war"; that the routes and particulars of navigation were determined by naval command; and that the naval authorities were responsible for the meeting of the two convoys without previous notice. It urges with plausibility that the

collision would not have happened but for the proceedings thus prescribed as an essential part of the conduct of the war. As corroborating its large interpretation of "consequences of hostilities or warlike operations" it states that, while the premiums upon war risk insurance were greatly increased, those upon marine risks underwent but little change.

On the other hand the common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. This is a settled rule of construction, and, if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their contract as they like. *Morgan* v. *United States,* 14 Wall. 531, applied this rule beyond the limits of insurance to a charter party made during the Civil War, by which the United States assumed the war risks and the owners were to bear the marine risks. The boat carrying troops and stores was compelled to put to sea by the orders of a quartermaster given to meet what he thought the exigency of the service, although the danger was obvious and the master and pilot advised against it. This Court recognized the hardship of the owners' case, in view of the peremptory order to proceed to sea, but declined to look beyond the wind and waves that were the immediate cause of the loss. A similar decision was reached by the House of Lords after the late war in a case where the chartered vessel, the Petersham, was sailing without lights because of Admiralty regulations and collided with a Spanish vessel also without lights, and it was found that because of the absence of lights the collision could not have been avoided by reasonable care. *Britain Steamship Co.* v. *The King,* [1921], 1 A. C. 99; affirming the decision of the Court of Appeal, [1919], 2 K. B. 670. See *Morgan* v. *United States,* 5 Ct. Clms. 182, 194; *Reybold* v. *United States,* 5 Ct. Clms. 277, 283, 284.

The same principle was applied to insurance, the special field of this narrow construction, in the case of the Matiana heard and decided with the Petersham, where a vessel was sailing under convoy and struck a reef without negligence on the part of the master or the naval officer in command of the escort. The discussion turned largely on the question whether the remoter causes of the collision and stranding were warlike operations, and from the tenor of the arguments on the one side and the other it may be doubted whether *Morgan* v. *United States* would not have been thought to go too far. But the Matiana certainly goes as far as the decision below in this case. There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, and as we could not reverse the decision below without overruling *Morgan* v. *United States,* we are of opinion that the decree of the Circuit Court of Appeals must be affirmed. We repeat that we are dealing not with general principles but only with the construction of an ancient form of words which always have been taken in a narrow sense, and in *Morgan* v. *United States* were construed to refer only to the nearest cause of loss even when there were strong grounds for looking beyond it to military command.

Decree affirmed.

PEOPLE OF THE STATE OF NEW YORK *v.* JERSAWIT, TRUSTEE IN BANKRUPTCY OF AJAX DRESS COMPANY, INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 352. Submitted December 3, 1923.—Decided January 7, 1924.

1. The tax laid on a domestic corporation in New York, (Tax Law, § 209,) for the privilege of exercising its franchise in the State, to

be paid annually "in advance" for the year beginning November 1st, to be computed upon the basis of the entire net income of the corporation for its fiscal, or the calendar, year preceding, is an entirety and cannot be apportioned to a fraction of the tax year which has elapsed when the corporation goes out of business. P. 495.

2. The State has a claim for the entire tax when the corporation is thrown into bankruptcy after lapse of part of the tax year. *Id.*

3. The addition of 10%, where the tax is not paid by January 1st, is a penalty, and the further addition of 1% for each month the tax remains unpaid, is not statutory interest, but part of the penalty; and neither can be allowed the State in a bankruptcy proceeding. Bankruptcy Act, § 57j. P. 496.

290 Fed. 950, reversed.

CERTIORARI to an order of the Circuit Court of Appeals which affirmed an order of the District Court, in bankruptcy, adjudicating a claim made by the State of New York for a tax.

Mr. Robert P. Beyer and *Mr. C. T. Dawes,* Deputy Attorneys General of the State of New York, for petitioner. *Mr. Carl Sherman,* Attorney General, was also on the briefs.

Mr. Henry B. Singer for respondent. *Mr. Abraham H. Rubenstein* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case comes here upon certiorari, 262 U. S. 741, to review a decision apportioning a claim in bankruptcy for taxes, presented by the State of New York. 290 Fed. 950. On December 22, 1920, a petition was filed against the Ajax Dress Company, a manufacturing or mercantile corporation of the State of New York, and it was adjudicated a bankrupt. The State filed a claim for a tax for the year between November 1, 1920, and October 31, 1921, and for "penal interest", under §§ 209

and 219-c of the Tax Law of New York. Section 209 provides that "For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic corporation . . . shall annually pay in advance for the year beginning November first . . . an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income for its fiscal or the calendar year next preceding." The Company ceased business on the day when the petition was filed and the Courts below held that the tax was to be apportioned to the time, somewhat less than two months, that the franchise was exercised. By § 219-c of the same tax law the tax is to be paid on or before January 1 of each year and if it is not paid the corporation liable shall pay "in addition to the amount of such tax, . . . ten per centum of such amount, plus one per centum for each month the tax . . . remains unpaid." The Courts below held that this latter liability was a penalty and therefore not to be allowed, but allowed six per cent. upon the tax as apportioned, to the date of payment. The State says that it is entitled to the statutory interest or none.

On the main question the Circuit Court of Appeals rightly recognized that the construction of the state law by the State Courts should control, but found nothing nearer than *People ex rel. Mutual Trust Co.* v. *Miller,* 177 N. Y. 51, where a different statute was held to tax the privilege of carrying on the business as actually exercised and therefore to create an apportionable liability. If the State Court should decide that the present act was to be construed in the same way we should bow, but until it does so we must regard the meaning as tolerably plain. The amount to be paid is not determined by the business done during the period taxed but by the net income of the year before. It is made a legal duty, by what the Courts below rightly held to be

a penalty, to pay the tax in advance. When the law discussed in the *Mutual Trust Company's Case, supra,* was amended so as to provide that the tax should be payable in advance, the Court of Appeals said that the amendment changed the character of the tax and that the grounds of the former decision were no longer applicable. *People ex rel. New York Central & Hudson River R. R. Co.* v. *Gaus,* 200 N. Y. 328. It hardly can be supposed that if the tax had been paid the State would recognize a claim for a proportionate return. We are of opinion that the tax is a tax upon the right conferred, not upon the actual exercise of it, that it was due when the petition in bankruptcy was filed, *New Jersey* v. *Anderson,* 203 U. S. 483, 494, and that the claim of the State for the whole sum should have been allowed.

There can be no doubt that the additional ten per centum charged for failure to pay by January 1 is a penalty, disallowed by the Bankruptcy Act, § 57j, but it is urged that the one per centum for each month of default is statutory interest and that the State is entitled to that and otherwise would be entitled to none. As the one per centum is more than the value of the use of the money and is added by the statute to the ten to make a single sum it must be treated as part of one corpus and must fall with that. We presume that in this event the State does not object to receiving the simple interest allowed. That part of the order will stand.

Order reversed.

IDE ET AL. *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 37. Argued April 18, 1923.—Decided January 7, 1924.

1. The Act of August 30, 1890, c. 837, 26 Stat. 391, in providing that, in all patents issued under the public land laws for lands west of the 100th meridian, there should be expressly reserved, rights of way "for ditches or canals constructed by the authority of the United States," is to be construed, in the light of the circumstances that prompted it, as including canals and ditches constructed after issuance of patent as well as those constructed before. P. 501.
2. Under a statute of Wyoming (Laws 1905, c. 85) granting rights of way over all lands of the State for ditches "constructed by or under the authority of the United States," and providing that reservations thereof shall be inserted in all state conveyances, patents of school land issued by the State to private parties expressly subject to rights of way "reserved to the United States," are subject to the right of the United States thereafter to construct and operate irrigation ditches for a reclamation project over the lands conveyed by the patents. P. 502.
3. This right may be exercised by straightening, and using as a ditch, a natural ravine, to collect waters appertaining to the federal project which have been used in irrigating its lands and are found percolating where they are not needed, and to conduct them elsewhere for further use upon the project. P. 503.
4. The evidence here shows that the ravine in question carried no natural flow of water susceptible of storage, or use in the irrigation season, and therefore none susceptible of private appropriation under the law of Wyoming, and that the water in controversy resulted from seepage from lands irrigated under the federal irrigation project. P. 503.
5. The right of the United States in water appropriated generally for the lands of a reclamation project is not exhausted by conveyance of the right of user to grantees under the project and use of the water by them in irrigating their parcels, but attaches to the seepage from such irrigation, affording the Government priority in the enjoyment thereof for further irrigation on the project over strangers who seek to appropriate it for their lands. P. 505.

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6. Evidence *held* to refute the contention that the Government had abandoned its right to the seepage waters in controversy. P. 506.
7. A water permit issued *ex parte* by the State Engineer of Wyoming is a mere license to appropriate water if available, and in accordance with the law of the State. P. 507.

277 Fed. 373, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which reversed a decree of the District Court for the defendants (appellants here) in a suit by the United States to enjoin interference with work in connection with an irrigation project.

Mr. D. A. Haggard and *Mr. Ray E. Lee,* with whom *Mr. David J. Howell,* Attorney General of the State of Wyoming, and *Mr. M. A. Rattigan* were on the brief, for appellants.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. W. W. Dyar,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a suit by the United States to enjoin threatened interference with changes which it is making in a natural ravine, called Bitter Creek, in the course of completing and perfecting an irrigation system known as the Shoshone Project. The changes consist in so straightening, widening and deepening the ravine that it may be utilized as a ditch to collect seepage from project irrigation and to carry the water so collected to other lands for further use in their irrigation. The defendants severally own small tracts of land within the project which are either crossed by or adjacent to the ravine, and some claim to have appropriated water in the ravine for the irrigation of their tracts. All, in their

answers, challenge the plaintiff's right to make the changes,—some on the ground that the work involves a trespass on their tracts, and others on the ground that it involves a destruction of their asserted appropriations. And on these grounds they ask affirmative relief.

After a hearing the District Court entered a decree for the defendants. In the Circuit Court of Appeals that decree was reversed with a direction to enter one for the plaintiff. 277 Fed. 373. The defendants then appealed to this court.

The project is a very large one, and was undertaken in accordance with the National Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388. It was formally approved in 1904; work on it was begun promptly, and parts of it are now nearing completion. It comprehends the impounding of the waters of the Shoshone River and the use of many tunnels, canals and laterals in carrying and applying them to large bodies of public land, all naturally arid and susceptible of cultivation only when irrigated. The lands are disposed of in small tracts as the work progresses, each disposal carrying with it a perpetual right to water from the project canals. The terms of disposal are such that the cost of construction and maintenance ultimately will be borne by the purchasers. There are also provisions under which other owners of small tracts may acquire rights to be supplied with project water by assuming the payment of a just charge.

The entire project is within the State of Wyoming, where irrigation is practiced and the doctrine of appropriation prevails. Pursuant to a direction in § 8 of the act and in conformity with the laws of the State, permits were sought and obtained from the state officers enabling the plaintiff to proceed with the impounding of the waters of the river,—which concededly were open

to appropriation,—and with their distribution, delivery and use in consummating the purposes of the project.

One branch of the project, known as the Garland Division, was designed to accomplish the reclamation and cultivation of a large body of lands, in the center of which was a school section of 640 acres owned by the State. The present controversy arose in that division. The ravine, called Bitter Creek, and the lands of the defendants are all there. In 1908 the work had progressed to a point where the plaintiff began delivering project water to lands in that division. In 1910 the plaintiff sold a small tract adjoining the school section to one of the defendants, and in 1913 sold a like tract similarly situated to another of the defendants. Both tracts are crossed by the ravine. These sales were made under the act, and each carried a project water right. In 1910 and 1911 the State sold most of the school section in small tracts to some of the defendants. Three or four of these tracts are crossed by the ravine. No water right passed with the sales; nor was any project water right sought or obtained by the purchasers. But they attempted to appropriate, and claim they did appropriate, water found in the ravine for the irrigation of their tracts.

It is made very plain on the record that when the defendants acquired the small tracts—two from the plaintiff and the others from the State—the work in that division was well advanced and still in progress, that water was then being delivered through project canals and laterals, that irrigation under them had begun and was being extended, and that the general situation was such as to put the defendants on inquiry respecting the rights which the plaintiff possessed and might exercise in completing and perfecting the work.

With this understanding of matters about which there can be no controversy, we come to the questions brought

to the attention of the courts below and pressed for decision here. Shortly stated they are, (1) whether the plaintiff has a reserved right of way over the small tracts, under which it may convert the ravine into a ditch to be used for the purposes already indicated; (2) whether, apart from seepage from project irrigation, the ravine carries a natural stream or flow of water susceptible of effective appropriation; (3) whether the plaintiff had a right to recapture and utilize seepage from project irrigation finding its way into the ravine, and (4), if it had, whether that right has been abandoned.

1. The patents for the tracts acquired from the plaintiff expressly reserve to it rights of way "for canals and ditches constructed or to be constructed by its authority," and that reservation is based on a direction in the Act of August 30, 1890, c. 837, 26 Stat. 391, that there be expressed in all patents issued under the public land laws for lands west of the one hundredth meridian a reservation of rights of way "for ditches or canals constructed by the authority of the United States." Because the patents say "constructed or to be constructed" when the statute only says "constructed," it is contended that the reservation is broader than the direction, and is to that extent void. But we think the contention ascribes to the direction a narrower scope than Congress intended it should have. The officers of the land department, as the patents show, regard it as comprehending all canals and ditches constructed under the direct authority of the United States, whether the construction precedes or follows the issue of the patent. That the words of the direction admit of this interpretation is plain, and that it accords with the legislative purpose is demonstrable. When the direction was given the United States had no canals or ditches on the public lands west of the one hundredth meridian, either constructed or in process of construction. As yet it had not become engaged in the reclamation of its arid public lands

in that region. But it was actively conducting investigations and collecting data with a view to developing and formulating a feasible plan for taking up and prosecuting that work. At an early stage of the investigations Congress became solicitous lest continued disposal of lands in that region under the land laws might render it difficult and costly to obtain necessary rights of way for canals and ditches when the work was undertaken. To avoid such embarrassment Congress at first withdrew great bodies of the lands from disposal under the land laws. Act of October 2, 1888, c. 1069, 25 Stat. 526; 19 Ops. Atty. Gen. 564; 9 L. D. 282; 11 L. D. 296. That action proved unsatisfactory, and, by the Act of August 30, 1890, Congress repealed the withdrawal, restored the lands to disposal under the land laws, and gave the direction that in all patents there should be a reservation of rights of way, etc. Of course the direction must be interpreted in the light of the circumstances which prompted it, and when this is done the conclusion is unavoidable that the direction is intended to include canals and ditches constructed after patent issues quite as much as those constructed before. All courts in which the question has arisen have taken this view. *Green* v. *Willhite,* 160 Fed. 755; *United States* v. *Van Horn,* 197 Fed. 611: *Green* v. *Wilhite,* 14 Idaho, 238.

Wyoming has a statute granting rights of way over all lands of the State for ditches "constructed by and under the authority of the United States" and providing that all conveyances by the State shall contain "a reservation for rights of way" of that class. Laws 1905, c. 85. The patents issued by the State for the tracts in the school section all contain a clause showing that the title was transferred subject to all rights of way granted under the laws of the State "or reserved to the United States." A contention is made that the statute and the reservation in the patents are confined to ditches constructed while the State owned the land. But it is not claimed that the

Supreme Court of the State has so decided, and as we read the statute and reservation they refute the contention.

We conclude that the plaintiff has a lawfully reserved right of way over the tracts of the defendants for such ditches as may be needed to effect the irrigation of the lands which the project is intended to reclaim, and that the defendants were apprised of this right by the patents which passed the tracts to them. In short, they received and hold the title subject to the exercise of that right.

Assuming that there is in the ravine crossing these tracts no natural stream or flow of water susceptible of effective appropriation, the plaintiff undoubtedly has the right to make any needed changes in the ravine and to use it as a ditch in irrigating project lands. The defendants do not question this, but they say that the ditch is to be used for drainage purposes, and that this is not within the reserved right. We need not consider the second branch of the objection, for the first is faulty. The evidence shows that the ditch is intended to collect project waters once used in irrigation, and found seeping or percolating where they are not needed, and to conduct them where they can be used in further irrigation. This plainly is an admissible purpose. The defendants also say that there is no need for making any change in the ravine, because its fall, depth, and other features render it adequate for the purpose. There is some testimony to this effect, but the weight of the evidence is quite the other way.

2. On the question whether there is in the ravine a natural stream or flow of water which could be the subject of an effective appropriation, the courts below differed, the District Court resolving it in the affirmative and the Circuit Court of Appeals in the negative. The evidence bearing on the question is conflicting, but the conflict is not difficult of solution, if regard be had for the varying opportunities of the several witnesses for observing and describing the natural conditions.

There was no irrigation in the vicinity of the ravine prior to 1908. Project irrigation there began that year and was gradually extended. Seepage from it promptly found its way into the ravine and kept pace with the irrigation. In 1910 there had come to be enough seepage to produce a small but appreciable flow during the irrigation season. That was an artificial flow, coming from a source created and controlled by the plaintiff. The defendants came on the scene after that flow began. One of them was the chief witness on their side, and the District Court, as shown by its opinion found in the record, attached much weight to his testimony. The witness never saw the ravine or the adjacent country until 1910, and his testimony reflected the changed rather than the natural conditions. The Circuit Court of Appeals rightly pointed this out, and gave greater weight to the testimony of witnesses whose observation and knowledge went back to a time when the natural conditions had not been disturbed.

We have examined the evidence and shall summarize what we regard it as proving.

The ravine is a wash or gully made by surface drainage through a long course of years. It has a length of several miles and receives the drainage from a large area devoid of trees and brush and without lakes or springs. The annual precipitation, including snow, is less than six inches, and the evaporation is pronounced. The water naturally draining into the ravine comes from melting snow and exceptional rains. That from melting snow causes an intermittent flow for about sixty days beginning late in February, and that from exceptional rains sometimes causes a flow for half a day or a day. At all other times the ravine is naturally dry. The flow from melting snow ceases before the irrigation season begins, and topographical conditions are such that it is not practicable to collect and store the water. The de-

fendants have not attempted to do so. The flow from rain is of such short duration and so uncertain that no practical use can be made of it.

As before stated, soon after the project irrigation began, seepage therefrom caused an artificial flow. At first this flow was slight and confined to the irrigation season, but it gradually increased in volume and duration as the irrigated area was extended.

From this summary it is apparent that for short and irregular periods, mostly outside the irrigation season, the ravine has a natural flow, but that this water is not susceptible of useful appropriation. In Wyoming an appropriation which is not useful is of no effect, for under the law of that State beneficial use is the basis, measure and limit of all appropriation. Comp. Stat. 1910, § 724. It follows that the asserted appropriations from the ravine are of no effect, unless they confer or carry some right in the artificial flow. Evidently this is what they really were intended to do.

3. The seepage producing the artificial flow is part of the water which the plaintiff, in virtue of its appropriation, takes from the Shoshone River and conducts to the project lands in the vicinity of the ravine for use in their irrigation. The defendants insist that when water is once used under the appropriation it cannot be used again,—that the right to use it is exhausted. But we perceive no ground for thinking the appropriation is thus restricted. According to the record it is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project. A second use in accomplishing that object is as much within the scope of the appropriation as a first use is. The state law and the National Reclamation Act both contemplate that the water shall be so conserved that it may be subjected to the largest practicable use. A further contention is that the plaintiff sells the water before it is used, and

therefore has no right in the seepage. But the water is not sold. In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water or to do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. Beyond this all rights incident to the appropriation are retained by the plaintiff. Its right in the seepage is well illustrated by the following excerpt from the opinion of District Judge Dietrich in *United States* v. *Haga,* 276 Fed. 41, 43:

"One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used."

An instructive application of this rule is found in *McKelvey* v. *North Sterling Irrigation District,* 66 Colo. 11.

4. Measures for collecting and using the seepage could not well be taken in advance of its appearance. When

it began to appear in appreciable quantity the plaintiff's officers took up the formulation of plans for utilizing it. The matter was much considered, for like problems were arising in connection with other projects. The advice of army engineers was sought; plans were recommended and adopted; necessary expenditures were authorized, and the work was then undertaken. That on the ravine was begun in 1914. At no time was there any purpose to abandon the seepage. On the contrary, the plaintiff needed and intended to use all of it for project purposes. This was stated and restated in various official reports, including some by the Director of the Reclamation Service and the Secretary of the Interior, and was well understood by the project officers. In these circumstances it is very plain that the plaintiff's right in the seepage was not abandoned.

As making against this conclusion, the defendants say that the plaintiff in 1910 applied to the State Engineer for a permit authorizing it to divert water from the ravine for the irrigation of particular lands and that the application was returned without approval. But we find no evidence of abandonment in this. If the application shows anything material in this connection, it is that the plaintiff was then intending to divert and use the seepage. The reason given by the State Engineer for returning the application without approval was that the irrigation of the particular lands was " already covered " by the plaintiff's existing permit. Certainly nothing was lost by the application or by the engineer's action thereon.

5. The appropriations from the ravine which are asserted by some of the defendants were made under permits issued by the State Engineer in 1910 and 1915, and this is advanced as a reason for sustaining them. The permits were based on *ex parte* applications and were mere licenses to appropriate in accordance with the law of the State, if the water was available. *Wyoming* v. *Colorado,* 259 U. S. 419, 488. We have seen that under the law of the

State the natural flow could not be appropriated, because the conditions did not admit of its beneficial use, and that the artificial flow was not available, because the plaintiff was entitled and intending to use it. The asserted appropriations therefore derive no support from the permits.

Decree affirmed.

SOUTHERN POWER COMPANY *v.* NORTH CAROLINA PUBLIC SERVICE COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 110. Argued November 28, 1923.—Decided January 7, 1924.

A writ of certiorari, granted under the impression, induced by the petition, that a question of public importance is involved, will be dismissed when the argument reveals that the impression was erroneous.

Writ of certiorari to review 282 Fed. 837, dismissed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed in part a decree of the District Court, in a case removed from a court of North Carolina. The proceeding was brought by the Public Service Company and two cities, under North Carolina statutes, to compel the present petitioner to continue furnishing electric power to the Public Service Company for use in operating street cars in the cities, and for the use of the cities and their citizens for light and power. The decree of the District Court, as modified by the court below, granted this relief.

Mr. R. V. Lindabury and *Mr. William P. Bynum,* with whom *Mr. W. S. O'B. Robinson, Jr., Mr. E. T. Causler* and *Mr. R. C. Strudwick* were on the brief, for petitioner.

Mr. John W. Davis and *Mr. Aubrey L. Brooks,* with whom *Mr. C. A. Hines* and *Mr. Dred Peacock* were on the brief, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This writ must be dismissed. The petition therefor stated that the cause involved a grave question of vital importance to the public, and alleged as special reason for its reëxamination that the decree would deprive petitioner of property without due process of law and of freedom to contract, contrary to the Federal Constitution. The opinion below is reported in 282 Fed. 837.

The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto.

Heretofore we have pointed out the necessity for clear, definite and complete disclosures concerning the controversy when applying for certiorari. *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association,* 242 U. S. 430; *Layne & Bowler Corporation* v. *Western Well Works,* 261 U. S. 387. The opinion first cited states that during the 1915 term one hundred fifty-four petitions were presented and suggests the probability of a largely increased number. During the last term (1922) petitions were filed in four hundred and twenty causes.

Obviously it is impossible for us critically to examine so many records before ruling upon applications and we must rely very largely upon preliminary papers. Unless the requirements specified in *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association* are observed we cannot hope properly to dispose of an increasing docket.

Dismissed.

HAAVIK *v.* ALASKA PACKERS ASSOCIATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 128. Argued November 15, 1923.—Decided January 7, 1924.

1. An annual poll tax, and an annual license imposed only on non-resident fishermen within Alaska, are within the power delegated to the Alaska legislature by the Organic Act. P. 514.
2. These taxes, as applied to a citizen of California who went to Alaska to engage in the business of fishing and remained there, so engaged, for four months, are not in conflict with the due process clause of the Fifth Amendment. *Id.*
3. Nor does the license tax, confined to non-residents, violate the "privileges and immunities" provision (Const., Art. IV, § 2,); nor was it arbitrary or unreasonable to favor local residents by exempting them from it. P. 515.

Affirmed.

APPEAL from a decree of the District Court, dismissing a libel brought by the appellant to recover the sum of ten dollars, claimed to be due him from the appellee, as part of his wages as a fisherman. The appellee had paid that sum to discharge the taxes laid on the appellant in Alaska, the constitutionality of which the appellant disputed.

Mr. H. W. Hutton for appellant.

No part of the United States can tax a resident of another part who is but temporarily in the taxing part for the purposes of trade and business. *Union Transit Co.* v. *Kentucky,* 199 U. S. 202; *St. Louis* v. *Ferry Co.,* 11 Wall. 423; *Hays* v. *Pacific Mail S. S. Co.,* 17 How. 596; *Dewey* v. *Des Moines,* 173 U. S. 193; *State Tax on Foreign-Held Bonds,* 15 Wall. 321; *Passenger Cases,* 7 How. 283; *On Yuen Hai Co.* v. *Ross,* 8 Sawy. 384; Desty, Taxation, p. 296; *Short* v. *State,* 80 Md. 392; Wharton, Conflict of Laws, §§ 47–81; Story, Conflict of Laws, § 43; *Oakland* v. *Whipple,* 39 Cal. 112; *People* v. *Niles,* 35 Cal. 282; *People* v. *Townsend,* 56 Cal. 633;

Robinson v. *Langley,* 18 Nev. 71; *Ex parte White,* 228 Fed. 88.

No part of the United States can levy a tax on interstate and foreign commerce. *Kelley* v. *Rhoads,* 188 U. S. 1; *Louisiana R. R. Comm.* v. *Texas Pac. Ry. Co.,* 229 U. S. 330; *Western Oil Co.* v. *Linscomb,* 244 U. S. 346; and other cases.

Can an integral part of the United States impose a special burden on a citizen and resident of another part, not imposed on its own people? *Ward* v. *Maryland,* 12 Wall. 418. *Geer* v. *Connecticut,* 161 U. S. 519, distinguished. Alaska permits anyone to take salmon for any purpose, but discriminates between residents and non-residents in a matter in which interstate and foreign commerce alone is involved.

The deduction of this tax from appellant's wages in San Francisco, was unlawful. Appellee is a California corporation. It could not at any time be present in Alaska. The contract of hiring was made in California. It was an entire contract and was only fully performed when those who signed it returned to this State. The earnings were payable only in San Francisco, except $10.00 payable after leaving Alaska.

A State cannot tax or affect a contract payable in another Territory. *State Tax on Foreign-Held Bonds,* 15 Wall. 300.

The school or poll tax in this instance operated in the case of libelant as a tax for the privilege of entering Alaska. *Crandall* v. *Nevada,* 6 Wall. 35; *State Treasurer* v. *P. M. B. R. R. Co.,* 4 Houston, 158.

The law taxing non-resident fishermen violated § 9 of the Organic Act of Alaska, providing: "nor shall the lands or other property of non-residents be taxed higher than the land or other property of residents." Appellant had property in the right to go to Alaska and fish.

The Act of July 30, 1886, c. 818, 24 Stat. 170, was a general law for all Territories, and prohibited the pas-

sage of special laws "for the assessment and collection of taxes for Territorial, county, township, or road purposes."

If the fisherman is not "employed", but works for himself, he does not pay the license tax, whether a resident or non-resident. The tax is special taxation.

If the District of Columbia should undertake to collect a poll tax from an attorney who went to Washington to argue a case before this Court, would not this Court hold the attempt void?

Art. IV of the Constitution declares: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." *Stoutenburgh* v. *Hennick,* 129 U. S. 141; *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U. S. 617; and the organic law of Alaska: "Sec. 3. That the Constitution of the United States . . . shall have the same force and effect within said Territory as elsewhere in the United States, . . ."

"While the word State is often used in contradistinction to Territory yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word State has been recognized in the decisions of this court." *Talbott* v. *Silver Bow County,* 139 U. S. 438-444.

The resident owner of a fishing boat can use it without this tax. The property right of the non-resident owner is thus discriminated against, contrary to § 9 of the Organic Act.

Mr. John Rustgard, Attorney General of Alaska, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellant challenges the validity of the Act of the Alaska Legislature approved May 1, 1919 (c. 29, Session Laws 1919), which imposes upon each male person, with certain exceptions, within the territory or the waters thereof an annual poll tax of five dollars to be used for school purposes; and also that portion of the Act of the same Legislature approved May 5, 1921 (c. 31, Session Laws 1921), which imposes an annual license tax of five dollars upon every non-resident fisherman—the term "to include all persons employed on a boat engaged in fishing."

Congress established an organized government for Alaska by the Act of August 24, 1912, c. 387, 37 Stat. 512. It declares that "the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." It also created a Legislature with power and authority, which "shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," subject to specified restrictions. One of them is this—"nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents."

While residing in California appellant was employed by appellee corporation, owner and operator, to serve as seaman and fisherman upon the sailing vessel, "Star of Finland." He sailed upon her to Alaska and served with her there while she engaged in fishing, from the middle of May, 1921, until the middle of September. In compliance with the above-mentioned statutes, appellee paid the taxes which they imposed upon him and, on final settlement, charged the same against his wages. By this proceeding he seeks to recover the amount so deducted. Without opinion the court below sustained the validity of the taxes. Both statutes have been considered and

upheld by the Circuit Court of Appeals for the Ninth Circuit. *Alaska Packers' Association* v. *Hedenskoy,* 267 Fed. 154; *Northern Commercial Co.* v. *Territory of Alaska,* 289 Fed. 786.

Plainly, we think, the Territorial Legislature had authority under the terms of the Organic Act to impose both the head and the license tax unless, for want of power, Congress itself could not have laid them by direct action. *Talbott* v. *Silver Bow County,* 139 U. S. 438, 448; *Binns* v. *United States,* 194 U. S. 486, 491; *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87; *Territory of Alaska* v. *Troy,* 258 U. S. 101.

Appellant went to the Territory for the purpose of engaging in the business of fishing and remained there for at least four months. He was not merely passing through —not a mere sightseer or tourist—but for a considerable period while so employed enjoyed the protection and was within the jurisdiction of the local government. To require him to contribute something toward its support did not deprive him of property without due process of law within the Fifth Amendment. Such cases as *Dewey* v. *Des Moines,* 173 U. S. 193, and *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 202, relied upon to support the contrary view, are not controlling.

The tax was upon an individual actually within the Territory; there was no attempt to reach something in a mere state of transit or beyond the borders. Some general rules touching the taxation of property were pointed out in *Brown* v. *Houston,* 114 U. S. 622, 632, 633, and *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18. No more stringent ones should be applied when poll taxes are questioned. Unless restrained by constitutional provision, the sovereign has power to tax all persons and property actually within its jurisdiction and enjoying the benefit and protection of its laws. Cooley on Taxation, 3d ed., p. 22.

We are not here concerned with taxation by a State. The license tax cannot be said to conflict with § 2, Art. IV, of the Constitution—"the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It applies only to nonresident fishermen; citizens of every State are treated alike. Only residents of the Territory are preferred. This is not wholly arbitrary or unreasonable, and we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the Territory must largely depend. See *Alaska Pacific Fisheries* v. *United States, supra,* and *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 47, 48.

None of the points relied upon by appellant is well taken and the decree below must be

Affirmed.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND SWIFT LUMBER COMPANY *v.* ILLINOIS CENTRAL RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

WYOMING RAILWAY COMPANY *v.* UNITED STATES AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

Nos. 40 and 38. Argued November 12, 13, 1923.—Decided January 7, 1924.

1. When a joint through rate, maintained by a trunk line and an independent connection, though not unreasonable in itself, works

undue prejudice to a shipper on the connection, in view of lower through rates for the same commodity from competing points in the same territory over the trunk line and its branches and other independent connections, both the trunk line and the other participant in the high rate participate in the unjust discrimination and may be required, by an order of the Interstate Commerce Commission, to remove the discrimination. P. 520.

2. A discrimination in rates is not illegal under § 3 of the Interstate Commerce Act unless it is unjust. P. 521.

3. The fact that preferential rates on traffic originating from some of its connections are given by a carrier in order to retain and increase its business, may relieve it from any charge of favoritism or malice, but it will not justify a resulting unjust discrimination. P. 523.

4. A difference in rates is not illegal unless shown not to be justified by the cost and value of the respective services rendered and by other transportation conditions. P. 524.

5. The fact that a rate is inherently reasonable and that a lower rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. *Id.*

6. A blanket rate from points on a trunk line was made applicable from points on some only of its connections through shrinkage or absorptions allowed the connecting carriers by the trunk line, with resulting prejudice to a shipper on another connection in the same territory to which the privilege was not extended. *Held*, that the fact that the preferential rate was for the purpose of developing traffic on the main carrier's lines, or of securing competitive traffic, did not establish the innocence of the discrimination as a matter of law, but was one only of several proven factors to be weighed by the Interstate Commerce Commission, and that the Commission's finding of unjust discrimination, based on a consideration of them all, was conclusive. *Id.*

7. Such a decision of the Commission is not an attempted substitution of the Commission's policy of rate-making for that of the carrier. P. 525.

8. An order of the Commission that a trunk line and short line, participating in a joint rate, desist from resulting discrimination, but which may be satisfied by raising other, competing rates of the trunk line, or by reducing its division of the joint rate complained of, is not subject to the objection that it will have a confiscatory effect upon the short line. P. 526.

9. An agreement of a shipper to ship all his products over a railroad is not a continuing assent to the rates in effect when it was made. P. 527.
10. The power of the Commission to remove unjust discrimination applies to a through rate consisting of a combination of locals as well as to a joint through rate. *Id.*

No. 40, decree reversed.

No. 38, decree affirmed.

APPEALS from decrees of the District Court in suits to enjoin enforcement of orders of the Interstate Commerce Commission. In the first case, there was a perpetual injunction; in the second, the bill was dismissed.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

Mr. Robert V. Fletcher, with whom *Mr. Walter S. Horton* was on the brief, for Illinois Central Railroad Company, appellee in No. 40.

Mr. Garner Wynn Green, with whom *Mr. Marcellus Green* was on the brief, for Fernwood, Columbia & Gulf Railroad Company, appellee in No. 40.

Mr. H. C. Lutkin, with whom *Mr. W. T. Alden, Mr. C. R. Latham, Mr. H. P. Young* and *Mr. Chas. Martin* were on the brief, for appellant in No. 38.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Mr. George J. Gulotta and *Mr. L. Palmer* filed a brief on behalf of Swift Lumber Company, appellant in No. 40.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases, brought to set aside orders of the Interstate Commerce Commission, were argued together, and present, in the main, the same questions of law. In

each, carriers who were found to have unjustly discriminated against shippers of lumber located on an independent short line, were ordered by the Commission to cease and desist from charging them higher through rates than were contemporaneously charged for like services from other points within what is called blanket territory.[1] Each case was heard before three judges on plaintiff's motion for a preliminary injunction, on defendant's motion to dismiss the bill for want of equity, and on final hearing. In each the whole record before the Commission was introduced. In No. 40 the federal court for southern Mississippi perpetually enjoined the enforcement of the order issued by the Commission in *Swift Lumber Co.* v. *Fernwood & Gulf R. R. Co.*, 61 I. C. C. 485. In No. 38 the federal court for Wyoming dismissed the bill; thus sustaining the order issued by the Commission in *Pioneer Lumber Co.* v. *Director General*, 64 I. C. C. 485. Each case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The facts in No. 40 present most of the questions of law requiring discussion. The so-called blanket territory, which extends south from Jackson, Mississippi, to the Gulf of Mexico (about 200 miles), and from the Mississippi River into Alabama, produces yellow pine lumber in quantity. Through this territory, the Illinois Central Railroad extends from New Orleans to Jackson and thence to the Ohio River crossings and leading lumber markets of the North. Partly by its main line, partly, also, by branches, and partly by connections with independent lines, it serves a large percentage of the lumber mills in the territory. From all these points on the

[1] Compare *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 138, note 1. The carriers insist that the rates are not properly called blanket rates, since they do not apply to all points within the territory; and that they should be termed group rates.

Illinois Central main line, from all on its branches, from all on three independent short lines which connect indirectly with it, and from all on the Mississippi Central (a longer independent line which crosses it running East and West) the carriers have established the same through lumber rates to the northern markets, regardless of the varying distances within the blanket territory. At Fernwood, Mississippi, a little south of its Monticello branch, the Illinois Central connects with the Fernwood & Gulf, an independent short line, on which the Swift Lumber Company has a mill at Knoxo. The distance from Knoxo to the junction is 27 miles. The joint through rate from Knoxo *via* Fernwood to northern points, voluntarily established by these carriers, is 2 cents per 100 pounds higher than the rate from Fernwood or any other point within the so-called blanket territory on the Illinois Central main or branch lines or on the connections mentioned above. The distance to the northern markets from many of the points on these lines is much greater than the distance from Knoxo, which lies near the centre of the so-called blanket territory.

The Swift Lumber Company instituted proceedings before the Commission against the Illinois Central, the Fernwood & Gulf, and connecting carriers in which it attacked the higher rates from Knoxo both as unreasonable, under § 1 of the Act to Regulate Commerce, and as unjustly discriminatory, under § 3. The Commission found that the rates from Knoxo were not unreasonable; but that they subject the Lumber Company to undue prejudice, in view of the lower rates so given competing points within the so-called blanket territory. The order directed the carriers "according as they participate in the transportation . . . to cease and desist" from the discrimination found. All the carriers except the Illinois Central and the Fernwood & Gulf acquiesced in the order.

These two joined as plaintiffs in this suit, and urge on several grounds that the order is void.

First. It is contended that the order exceeds the powers of the Commission. The argument is that a carrier cannot be held to have participated in an unjust discrimination unless it is a party both to the rate by which a preference has been given to others and to the higher rate which is given to the complainant; that the Fernwood & Gulf did not participate in the discrimination complained of, since it did not join in the lower rates from other points by which the Swift Lumber Company claims to be prejudiced; and hence, that it cannot be required to coöperate with the Illinois Central in reducing rates from Knoxo which have been found to be inherently reasonable. That, on the other hand, the Illinois Central cannot be held to have subjected the Swift Lumber Company to undue prejudice, since Knoxo is not on its own lines and it is not in a position to remove, by its own act, the discrimination complained of. Neither proposition is sound. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practiced, as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it.[2] Moreover, it is not true that the Illinois Central can-

[2] The cases relied upon by the carriers are not inconsistent with this conclusion. In *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, the creosoting privilege was not a part of the joint tariff. It was an item in the local tariff granted without the con-

not remove the discrimination without the coöperation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point.[3]

Second. It is contended that the order of the Commission is unsustained by proof. That there is discrimination against Knoxo is not denied. The rates charged from that station are higher than those charged from competing points within the so-called blanket territory for transportation of the same commodity, to the same market, for the same or longer distances, mainly over the same route; some of these competing points being located on the Illinois Central main line, some on its branch lines, and some on independent lines. But mere discrimination does not render a rate illegal under § 3. Only such rates as involve unjust discrimination are obnoxious to that section. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481. There is no claim that any one of the evidential facts found by the Commission and relied upon to show

currence of the carriers before the Commission; and the revenues derived therefrom were not shared by them. In *Philadelphia & Reading Ry. Co.* v. *United States,* 240 U. S. 334, 340, it was pointed out by the Court that: "Undue discrimination against itself or the locality of its plant, as alleged by the cement company [the petitioner before the Commission] was not found; the community declared to be prejudiced by established conditions [Jersey City] had offered no complaint and was not party to the proceedings." In *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.,* 208 U. S. 208, 221-222, it was sought to hold one of the connecting carriers liable for what the Court deemed to be the act of another.

[3] See *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 139, note 2.

that the discrimination was unjust, is without adequate supporting evidence. The argument is that these facts, even when supplemented by others appearing in the evidence, do not warrant the finding of the ultimate fact, that the higher rates from Knoxo are unduly prejudicial to the Swift Lumber Company to the extent that they exceed the blanket basis of rates from Fernwood (the junction with the Illinois Central) and other points.

A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise. *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 118-119; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92. In the exercise of this right, the Illinois Central adopted the policy of establishing blanket, or group, rates on its main and branch lines, by which the remoter lumber producing points were granted, regardless of distances within the territory, the same rates to northern markets as points located nearer. In the exercise of the same right to initiate rates, the Illinois Central adopted, also, the policy of granting to connecting independent short lines, and to longer connecting carriers, an allowance (called shrinkage or absorption) by reason of which the Illinois Central's division of the through rate on traffic originating on connections is reduced, by the amount of the allowance, to less than its rate for freight originating on its own line at the junction point.[4] The Illinois Central insists that its general policy is not to grant to points on connecting lines the blanket, or junction-point rate; and that it departs from this policy only when it is compelled by competition to do so. Where the through rate is the

[4] See *The Tap Line Cases*, 234 U. S. 1; *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114.

same from points on the connecting line as it is from the junction, the share or division of the connecting carrier consists wholly of this absorption. Where the through rate from points on the connection is higher than the junction-point rate, the connecting line receives as its share an additional amount consisting of the difference between these rates. This additional amount is called the arbitrary or differential. Thus, the Fernwood & Gulf receives a division of 4 cents per 100 pounds, consisting of a 2-cent absorption and a 2-cent arbitrary.[5]

The Illinois Central argues that the discrimination in charging a higher rate from Knoxo cannot be deemed unjust since the preferential rate to other points was granted solely for the purpose of increasing its own business, and that the lower rate from Knoxo was denied solely in order to preserve its own revenues. In other words, it granted the blanket rate to all points on its own lines in order to develop business originating thereon. It declined to grant the blanket rate (and to increase the absorption) where the connecting line was wholly dependent upon it; and traffic originating thereon could be secured in spite of the higher rate. It granted the blanket rate to points on connecting lines (and increased their absorptions) where this was deemed necessary in order to secure traffic which might otherwise go to competitors.

The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of

[5]As a division of only 2 cents is ordinarily deemed inadequate compensation by a connecting line, and as the trunk line is naturally indisposed to submit to a larger shrinkage of its own division, the through rate is commonly increased by an arbitrary, if the traffic will bear it.

favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates. It is true that the law does not attempt to equalize opportunities among localities, *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46; and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445. To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions. But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.

Every factor urged by the carriers as justifying the higher rate from Knoxo appears to have been considered by the Commission. How much weight shall be given to each must necessarily be left to it. The Commission found, among other things, that the cost of the service from Knoxo was not greater than the cost of the transportation from many other points which enjoy the lower rate; that the value of the service was the same; and that other traffic conditions incident to shipment from Knoxo were so similar to those of shipments from other points enjoying a lower rate that the prejudice to which

the Swift Lumber Company had been subjected was undue and unreasonable. The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.,* 168 U. S. 144, 167, 175. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now, the interests of the individual carrier must yield in many respects to the public need, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *New England Divisions Case,* 261 U. S. 184; and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable. The order of the Commission was not an attempt to establish its own policy of rate-making.[6] See *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 554. It merely expressed the judgment of the Commission that existing rates subjected shippers from Knoxo

[6] Compare *Idaho* v. *Director General,* 66 I. C. C. 330, with *Idaho* v. *Oregon Short Line,* 83 I. C. C. 4.

to undue prejudice. The judgment so exercised, being supported by ample evidence, is conclusive.[7]

Third. The Fernwood & Gulf contends that the order is obnoxious to the due process clause. The argument is that even its present division of 4 cents per 100 pounds is unremunerative; and that a smaller return would be confiscatory. To this argument there are several answers. The order does not require a reduction of the through rate. It may be complied with by raising the rate from Fernwood and other points now being preferred. Moreover, a reduction of the through rate would not necessarily result in decreasing the amount of the short line's division. The Commission may, upon application, accord to the Fernwood & Gulf the appropriate division.[8] *New England Divisions Case,* 261 U. S. 184. There is no suggestion that the resulting reduction of the Illinois Central's division would result in rendering the rate confiscatory as to it.

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[7] *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western R. R. Co.,* 220 U. S. 235, 251; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62.

In *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission,* 181 U. S. 1, 11, 12, 23–26, and *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 190 U. S. 273, the orders of the Commission were only *prima facie* evidence of facts found by them, since they were entered before the Acts of June 29, 1906, c. 3591, 34 Stat. 584, 589, 591, and the Act of June 18, 1910, c. 309, 36 Stat. 539, 551–554. See *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 297–8; *Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville R. R. Co.,* 37 Fed. 567, 613. Moreover, those cases involved primarily a question arising under the Fourth Section.

[8] This was done, after removing the unjust discrimination, in *McGowan-Foshee Lumber Co.* v. *Florida, Alabama & Gulf R. R. Co.,* 43 I. C. C. 581; 51 I. C. C. 317.

Fourth. The Fernwood & Gulf contends also that the Swift Lumber Company is estopped from questioning the rates applicable to it. The argument is that when it acquired the mill property from a predecessor of the short line, an agreement provided that all lumber produced should be shipped over the line; and that the 2-cent arbitrary was then known to be in effect, and was thereby assented to for all time. The contract, which is silent as to rates, is not susceptible of the construction urged. We have, therefore, no occasion to consider whether such an agreement would be valid and what its effect would be. Compare *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433; *United States* v. *Union Stock Yard Co.,* 226 U. S. 286; *O'Keefe* v. *United States,* 240 U. S. 294.

In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short line points is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, expressed or implied.[9] Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

In No. 40, decree reversed.
In No. 38, decree affirmed.

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[9] See *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 139, note 2.

PEORIA & PEKIN UNION RAILWAY COMPANY *v.* UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 318. Argued November 20, 21, 1923.—Decided January 7, 1924.

1. The authority conferred upon the Interstate Commerce Commission by the Transportation Act, 1920, to issue orders without notice or hearing, in certain classes of cases, if it finds that an emergency exists, does not sustain an order, so issued, requiring a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by or for another connecting carrier. P. 532.
2. The provision of the Act of October 22, 1913, that suit to set aside an order of the Commission shall be brought in the district of the residence of the party on whose petition the order was made, relates to venue, not to jurisdiction of the subject matter; and objection that the suit is in another district, will be waived if not made in the trial court. P. 535.
3. In a suit of that kind, wherein the District Court overruled an objection by the United States to the venue, but refused a temporary injunction, and the plaintiff appealed, *held* that the right of the United States to insist upon its objection was lost by its failure to take a cross appeal. *Id.*

Reversed.

APPEAL from a decree of the District Court refusing a temporary injunction in an action to set aside an order of the Interstate Commerce Commission.

Mr. Robert V. Fletcher, with whom *Mr. John M. Elliott* was on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

The emergency order was entered on the petition of Minneapolis & St. Louis Railroad, a resident of Iowa, and the District Court was without jurisdiction. Urgent De-

ficiencies Act 1913, 38 Stat. 209, 219; Commerce Court Act, 36 Stat. 539, 542; *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Oregon* v. *Hitchcock,* 202 U. S. 60; *United States* v. *Lee,* 106 U. S. 196; *Kansas* v. *United States,* 204 U. S. 331; *Illinois Central R. R. Co.* v. *Public Utilities Comm.,* 245 U. S. 493; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557; *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; Interstate Commerce Act, § 5, 34 Stat. 584, 592.

The order was within the power of the Commission. Transportation Act, §§ 400, 402, 41 Stat. 456, 474, 476; *Pennsylvania Co.* v. *United States,* 236 U. S. 351.

Mr. R. Granville Curry, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

The order was within the authority conferred upon the Commission by the Interstate Commerce Act, and was entered in accordance with the duties imposed upon the Commission by this act. *Wisconsin R. R. Comm.* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563, 585; *New England Divisions Case,* 261 U. S. 184, 189; *Interstate Commerce Comm.* v. *Illinois Central R. R. Co.,* 215 U. S. 452, 470, 477; *New Haven R. R. Co.* v. *Interstate Commerce Comm.,* 200 U. S. 361, 391; *Armour Co.* v. *United States,* 209 U. S. 56, 72. See also *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17; *Director General* v. *Viscose Co.,* 254 U. S. 498, 504; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481, 488; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U. S. 57, 62; *Baltimore & Ohio R. R. Co.* v. *Lambert Run Coal Co.,* 267 Fed. 776; s. c. 258 U. S. 377; *United States* v. *Louisville & Nashville R. R. Co.,* 195 Fed. 88, 96.

The order is not unconstitutional. *New England Divisions Case,* 261 U. S. 201; *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 143.

Mr. Donald Evans, with whom *Mr. M. M. Joyce* was on the brief, for Minneapolis & St. Louis Railroad Company, appellee.

Whether, as an abstract proposition, the order in its terms goes beyond the powers conferred by Congress is immaterial, for the reason that, under the situation as presented by the record, the plaintiff has failed to show that, as a result of the issuance of the order, its property is being taken for public use without compensation, or that it is deprived of its property without due process of law. The claims of constitutional infringement of plaintiff's rights are based entirely upon the assumption that the services required to be performed and the facilities furnished are performed for and furnished to the Minneapolis & St. Louis Railroad Company. This is an erroneous assumption. The facilities are furnished to the tenants of the plaintiff under tenancy contracts. The services are performed for the tenants under the same agreements. By virtue of those contracts, the facilities have become part of the railroads of the tenants, and neither they nor their agent has any right to collect from a connection a charge for receiving or delivering a car in interchange. The plaintiff has no right to be compensated by this defendant, and, this being the only right of which it claims it is deprived by the issuance of the service order, it follows that the order of the District Court must be affirmed.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Transportation Act 1920 confers upon the Interstate Commerce Commission authority to issue, in certain classes of cases, orders " with or without notice, hearing, or the making or filing of a report," if it finds that an emergency exists. Act of February 28, 1920, c. 91, § 402, 41 Stat. 456, 476–477, 486.

Purporting to act under this power, the Commission ordered, without notice or hearing, that the Peoria &

Pekin Union Railway Company " continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill." This order required the terminal company to switch, by its own engines and over its own tracks, freight cars tendered to it by, or for, the Minneapolis & St. Louis, a service which it had threatened to discontinue because the payment demanded therefor had been refused.[1] The Peoria Company insisted that the Commission was without authority under its emergency power to require one carrier to switch cars for another; and brought this suit against the United States in the federal court for southern Illinois to enjoin the enforcement of the order. The Commission and the Minneapolis & St. Louis intervened as defendants. The case was heard upon application for a temporary injunction; the injunction was denied; and the Peoria Company took a direct appeal to this Court under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

It is conceded that the Commission could, under its general powers and upon appropriate procedure, order a terminal company to perform a service of this character. But under the general powers of the Commission this could be done only after full hearing, and such an order would ordinarily not take effect under the law until thirty days after service.[2] It is also conceded that the existing

[1] See *Minneapolis & St. Louis R. R. Co.* v. *Peoria & Pekin Union Ry. Co.*, 68 I. C. C. 412; *Intermediate Switching Charges at Peoria, Ill.*, 77 I. C. C. 43.

[2] See *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 20; Act to Regulate Commerce, § 3, par. 3, 41 Stat. 456, 479; and see § 15 as amended, 34 Stat. 584, 589; 41 Stat. 456, 485. Compare Hearing on Car Service Shortage before the Senate Subcommittee of the Committee on Interstate Commerce, May 3, 1917, S. 636, 65th Cong., 1st sess., p. 30.

conditions were such as to justify entry of the order under the emergency powers, if these include the requiring of switching. The objection urged is that the emergency power conferred is limited to orders which direct the manner in which transportation service shall be rendered or which prescribe the use to be made of railroad property; and that no such authority is granted to require performance of a transportation service. The substantive question presented is one of statutory construction—the scope of the emergency power.

The Commission possessed no emergency power prior to the so-called Esch Car Service Act, May 29, 1917, c. 23, 40 Stat. 101.[3] Its provisions were amended by Transportation Act 1920; and in the amended form are introduced as paragraphs 15 and 16 of § 1 of the Act to Regulate Commerce and as paragraph 4 of § 15. 41 Stat. 476–7, 486. Paragraph 15 deals in sub-paragraphs (*a*) and (*b*) with car service; in sub-paragraph (*c*) with the common use of terminals; in sub-paragraph (*d*) with preferences in transportation, embargoes, and movement of traffic under permits. Paragraph 16 and the amendment to § 15 confer emergency power to reroute traffic and to "establish temporarily such through routes as in its [the Commission's] opinion are necessary or desirable in the public interest." None of these provisions grants in terms power to require the performance of a transportation service. The specific grant in paragraph 16 of emergency power to "make such just and reasonable directions . . with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads," and the omission of any reference to switching, tend to rebut an intention to grant the power here asserted. The order cannot be justified

[3] Except that to suspend a tariff increasing rates, as provided in the Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 552, added to § 15 of the Act to Regulate Commerce as paragraph 7.

as dealing with preferences in transportation or embargoes under sub-paragraph (*d*). Nor does the order provide for the joint use of terminals under sub-paragraph (*c*)[4]; since it does not purport to authorize the Minneapolis & St. Louis to use the tracks and terminals of the Peoria Company. The contentions mainly urged are that the order is one concerning car service under sub-paragraph (*b*)[5]; or that power to require switching should be held to have been granted by implication.

The argument that the authority of the Commission over car service should be construed to include the requiring of switching rests upon paragraph 10 of amended § 1 of the Act to Regulate Commerce.[6] But "car service" connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them.[7] Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instru-

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[4] Sub-paragraph (*c*): "to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest . . ."

[5] Sub-paragraph (*b*): "to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

[6] Paragraph 10: "The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act."

[7] The purpose of the amendment is clearly stated in the report of the House Committee on Interstate and Foreign Commerce, submitting H. R. 10,453, enacted as Transportation Act 1920: "Section 402 amends the Car Service Act of May 29, 1917, in several particulars. Originally the term 'car service' included 'the movement,

mentalities available in emergencies to a carrier other than the owner was the sole purpose of sub-paragraphs *a*, *b*, and *c*. It is to this end only, that provision is made by paragraph 10 for the "movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property." This is substantially the same expression as was used in the Esch Car Service Act. The 1920 Act merely adds locomotives and other vehicles.

Transportation Act 1920 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power

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distribution, exchange, interchange, and return of cars used in the transportation of property.' As amended the term is made to include the use, control, supply, movement, distribution, etc., not only of cars, but of locomotives and other vehicles. It is further extended to include, 'the supply, movement, and operation of trains by any carrier by railroad subject to this act', and so require every carrier by railroad 'to furnish safe and adequate car service.'" House Report 456, 66th Cong., 1st sess, p. 17. In discussing the bill before the House, on November 11, 1919, Chairman Esch said: "We also give the Commission greater power in cases of emergency. You know we have had an emergent condition throughout the country many times in recent years. We want the Commission to have the power to act promptly on the spur of the moment in case of emergency in order to prevent congestion at terminals; in order to route traffic around a congested terminal so that it may reach its destination at the earliest possible date; in order to ship goods over the most direct route regardless of instructions contained in the bills of lading. We want all this power to be exercised by the Commission in an emergency. The bill gives such powers to the Commission." 58 Cong. Rec. 8315–8316. See also 58 Cong. Rec. 8529–8531; 59 Cong. Rec. 3263. The reports of the committees of the House and of the Senate on the Esch Car Service Act, and the further explanation of that bill by the chairmen in charge of it, confirm the conclusion that the term "car service" is used in this limited sense. See House Report 1553, 64th Cong., 2nd sess., pp. 2, 6–9; House Report 18, 65th Cong., 1st sess., pp. 5–8; Senate Report 43, 65th Cong., 1st sess., pp. 2–4; 55 Cong. Rec. 2018, 2020–2022, 2024–2025, 2631, 2701.

to that end; and the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication. Moreover, switching service differs in character from those as to which such power is expressly granted. These involve either the use by one carrier of property of another or the direction of the manner and the means by which the service of transportation shall be performed. The switching order here in question compels performance of the primary duty to receive and transport cars of a connecting carrier. That courts may enforce such duties by a mandatory injunction, including a preliminary restraining order, has long been recognized.[8] It may be that Congress refrained, for this reason, from conferring emergency power of this character upon the Commission.

The United States contends, also, that the decree dismissing the bill should be affirmed, because under the Act of October 22, 1913, c. 32, 38 Stat. 208, 219–220, the proper venue was the District of Iowa, that being the residence of the Minneapolis & St. Louis Railroad. Compare *Illinois Central R. R. Co.* v. *State Public Utilities Commission,* 245 U. S. 493, 504, 505; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 563. The provision that suit shall be brought in the district of the residence of the party on whose petition the order was made is obviously one inserted for his benefit.[9] If there

[8] See *Toledo, Ann Arbor, etc., Ry. Co.* v. *Pennsylvania Co.,* 54 Fed. 730, 746; *Chicago, Burlington & Quincy Ry. Co.* v. *Burlington, Cedar Rapids & Northern Ry. Co.,* 34 Fed. 481. Compare *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa,* 233 U. S. 334; *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128; *Union Pacific R. R. Co.* v. *Hall,* 91 U. S. 343.

[9] Prior to the Act of June 18, 1910, c. 309, 36 Stat. 539, creating the Commerce Court (which was abolished by Act of October 22, 1913, c. 32, 38 Stat. 208, 219), the venue of suits brought to enjoin or annul an order of the Commission was the district where the carrier had his principal operating office. Act of June 29, 1906, c. 3591, § 5, 34 Stat. 584, 592.

were a lack of jurisdiction in the district court over the subject matter, we should be obliged to take notice of the defect, even if not urged below by the appellee. *Mattingly* v. *Northwestern Virginia R. R. Co.*, 158 U. S. 53, 57. But the challenge is merely of the jurisdiction of the court for the particular district. The objection is to the venue. See *Camp* v. *Gress*, 250 U. S. 308, 311. This privilege not to be sued elsewhere can be waived; and it was waived both by the Minneapolis & St. Louis Railroad and the Commission. The United States was, nevertheless, entitled to insist upon compliance with the venue provision; and its objection was properly taken below. But by failure to enter a cross appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this Court only in support of the decree which was rendered. *The Maria Martin*, 12 Wall. 31, 40; *Bolles* v. *Outing Co.*, 175 U. S. 262, 268. We have, therefore, no occasion to consider whether the suit was brought in the proper district.

Reversed.

CORONA COAL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 42. Argued November 23, 26, 1923.—Decided January 7, 1924.

Where coal, requisitioned by the Fuel Administration for the Railroad Administration, was paid for by the latter at prices fixed in contracts between certain carriers, which it took over, and the coal owner, *held:*

(*a*) That the owner's claims against the Railroad Administration, reserved in the requisition, for the difference between the price paid and the greater price then fixed generally by the Fuel Administration, were causes of action arising out of the possession, use and operation of the carriers by the President, within Transportation Act, § 206a, authorizing suit against the agent appointed by him. P. 539.

(*b*) Under Jud. Code, § 154, the institution and pendency of such actions in the District Court prevents prosecution of an appeal pending here from an earlier judgment of the Court of Claims rejecting a claim against the United States on the same cause. *Id.*

(*c*) This prohibition of § 154 cannot be avoided upon the ground that the later actions were brought to avoid the time limitation of the Transportation Act. *Id.*

Appeal to review 57 Ct. Clms. 607, dismissed.

APPEAL from a judgment of the Court of Claims dismissing a petition.

Mr. Forney Johnston for appellant.

The actions instituted in the District Court against James C. Davis, as agent of the President (as nominal defendant), under § 206a, Transportation Act, 1920, are not such suits or process as are contemplated by § 154, Jud. Code.

They are not pending against any person who, when the cause of action arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

The causes of action arose during federal control of railroads. Davis was appointed Director General and Agent of the President, under § 206a, by Executive Order of March 26, 1921.

The action in the Court of Claims is based upon a contract, express or implied, under averments which, appellant conceives, confer jurisdiction upon the Court of Claims. By demurrer and argument in that action, counsel for the United States took the position that the cause should properly be brought in the District Court, against Davis, as agent of the President, under § 206a. The Court of Claims held that the cause of action before it was proper to be brought only in the District Court against the United States, under § 10 of the Lever Act. The statute of limitations fixed by § 206a is two years from the date of approval of the Transportation Act,—February 28, 1920. In view of this diversity of opinion as to the proper forum, and in order to avoid the bar of the statute should the position of the United States be sustained, it was necessary that appellant should file the actions in the District Court.

Section 154, Jud. Code, is intended to prevent contemporaneous actions against the United States and against a person (other than the United States), for the same cause of action, under such circumstances that a judgment against the person might be made the basis of a claim by him for reimbursement, against the United States. The statute does not contemplate cases where both suits are in substance and effect against the United States, as here.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the briefs, for the United States.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Appellant sued in the Court of Claims for a balance alleged to be due for coal delivered to the United States. Some time prior to the delivery appellant had entered into contracts with certain railroad companies to supply them with coal for specified periods of time and at stated prices. Upon the passing of the railroads into the control of the Government, by virtue of the President's proclamation of December 26, 1917, 40 Stat. 1733, the Railroad Administration claimed the right to enforce these contracts. The right was denied; whereupon the Fuel Administration requisitioned the coal "without prejudice to your [appellant's] right to assert a claim against the Railroad Administration or these various railroad companies," for any amount claimed to be legally payable. The Railroad Administration paid the prices fixed by the contracts, asserting that these were the measure of its liability. The general price for coal theretofore fixed by the Fuel Administration was more than the contract price, and this action was for the difference. The court below sustained a demurrer to the petition and dismissed it. After the rendition of judgment and before the appeal to this Court, appellant brought actions in the Federal District Court for the Eastern District of Louisiana against James C. Davis, as Agent for the President under the Transportation Act of 1920, c. 91, 41 Stat. 456, the causes of action therein set forth being the same as that set forth in the present case. These alleged causes of action arose out of the possession, use and operation by the President of the railroads in question and come within the provisions of § 206 (a) of the act, c. 91, 41 Stat. 461.

The Government has submitted a motion to dismiss the appeal, relying upon the provisions of § 154 of the Judicial Code, which reads:

"No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom,

any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

At the time the alleged causes of action arose the President was acting under the authority of the United States, and the actions being against an agent appointed by and acting for him, fall within the terms of the statute just quoted. It is urged, however, that the actions were brought, *ex necessitate rei,* because they were about to become barred by expiration of the statutory period of limitation and that, for this and other reasons, the case is not within the spirit of § 154 properly construed. But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases. See *Amy* v. *Watertown,* 130 U. S. 320; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, 295; *United States* v. *First National Bank,* 234 U. S. 245, 259–260.

Appeal dismissed.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY *v.* BURTCH, ADMINISTRATRIX OF BURTCH.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 115. Argued December 3, 4, 1923.—Decided January 7, 1924.

1. In determining whether a case appealed from a state court should have been governed by the Federal Employers' Liability Act, uncontradicted evidence establishing the interstate character of a shipment must prevail here over the special findings and general verdict of the jury. P. 543.

2. Authority of the conductor of a freight train to employ a bystander to assist in unloading heavy freight may be derived from custom and the exigency of the occasion. P. 543.
3. The unloading, at destination, of an interstate shipment, by employees of the carrier, is so closely related to interstate commerce as to be practically a part of it. P. 544. *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556.
4. The liability of an interstate carrier for an accident suffered by a part owner of a heavy article of freight while assisting, as the carrier's employee, in unloading it from the car, was not affected by the existence of a rule filed by the carrier with the Interstate Commerce Commission requiring owners of such articles, under stated conditions, to unload them, since the rule did not affect the relations between the carrier and its employees, but must be observed only to prevent discrimination among shippers, and failure to enforce it was no part of the cause, but was merely an attendant circumstance, of the accident. P. 544.

134 N. E. 858, reversed.

CERTIORARI to a judgment of the Supreme Court of Indiana, affirming a judgment, for personal injuries, recovered by the respondent's intestate in an action against the petitioner.

Mr. William A. Eggers, with whom *Mr. Morison R. Waite, Mr. Harry R. McMullen* and *Mr. Cassius W. McMullen* were on the briefs, for petitioner.

Mr. Oscar H. Montgomery, with whom *Mr. T. Harlan Montgomery, Mr. Merrill Moores* and *Mr. Wm. J. Hughes* were on the brief, for respondent.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is an action brought by Guerney O. Burtch against the Railroad Company to recover damages for a personal injury suffered, as a result of the company's negligence, while he was engaged in assisting to unload a heavy ensilage cutter from a freight train at Commiskey, Indiana.

After the allowance of the writ of certiorari Burtch died and his administratrix was substituted as respondent.

The complaint is in two counts, the only one necessary to be considered being drawn upon the theory that at the time of the injury Burtch was an employee of the company and both were engaged in intrastate commerce. The answer denies the allegations of the complaint and alleges facts to establish that at the time of the injury they were engaged in interstate commerce. The contention, therefore, upon the one hand, was that the case was governed by the State, and upon the other hand, that it was governed by the Federal, Employers' Liability Act. The distinction is material, since certain common law defences abrogated by the former, are still available under the latter.

It is clear that the trial court assumed that the state and not the national law applied and the case was submitted to the jury upon that theory; and this presents the only question which it is necessary for us to consider. The jury returned a verdict in Burtch's favor, the judgment upon which was affirmed by the Supreme Court. 134 N. E. 858.

That the train carrying the cutter came from Louisville, Kentucky, is not disputed; but it is contended that there was no evidence from which it could be determined that the shipment originated there or at any other point outside the State of Indiana; and the jury, in answer to certain interrogatories, so found. These interrogatories and answers are as follows:

"Did said car come in said train from Louisville, Kentucky, to Commiskey?

"Ans. The train came from Louisville. No evidence where car came from.

"Did said cutter come to said Commiskey in said car from Louisville, Kentucky?

"Ans. No evidence."

If, in truth, there be no evidence from which these facts can be found or if the evidence be conflicting, we can, of course, inquire no further. But if, on the contrary, the uncontradicted evidence affirmatively establishes that the shipment originated in Louisville, Kentucky, and thence was carried to Commiskey, Indiana, it was an interstate shipment, and neither the special findings nor the general verdict will preclude us from so holding. Lurton, the consignee, testified that he obtained the cutter "through an Indianapolis concern but it was shipped from a warehouse in Louisville," and that the bill of lading was made out to him from Louisville to Commiskey. Hartwell, a telegraph operator, testified that the freight train came from Louisville and "this cutter was in one of the cars of that train that came from Louisville." This constitutes the entire evidence upon the point and plainly establishes the interstate character of the shipment. But this is not enough. It is necessary to show further that "the employee at the time of the injury [was] engaged in interstate transportation or in work so closely related to it as to be practically a part of it." *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558.

There is a preliminary dispute as to whether Burtch stood in the relation of employee at the time of the injury, and this we first consider. The testimony shows that Burtch was not regularly employed but that he engaged in this particular work at the request of the train conductor, because it was necessary to unload the cutter and the train crew was unable to do so without help. The evidence tends to show that the conductor, in making the request, followed a long-standing practice to call upon bystanders to assist in unloading heavy freight. These facts, either undisputed or established by the verdict of the jury under appropriate instructions, are ample to sustain the conclusion reached below that there was an exigency which authorized the conductor to employ out-

side assistance and that Burtch, for the time being, occupied the relation of employee to the company. See, for example, *Marks* v. *Railway Co.*, 146 N. Y. 181, 189–190; *Fox* v. *Chicago, St. P. & K. C. Ry. Co.*, 86 Iowa, 368, 373; *Haluptzok* v. *Great Northern Ry. Co.*, 55 Minn. 446, 450; *Maxson* v. *Case Threshing Machine Co.*, 81 Neb. 546, 550; *Aga* v. *Harbach*, 127 Iowa, 144. The train upon arrival at Commiskey drew in upon a sidetrack where the cutter was unloaded and the train then proceeded on its way. It was while assisting in this work that Burtch sustained the injury sued for. It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it, and it follows that the facts fully satisfy the test laid down in the *Shanks Case, supra.*

It appears that Burtch was interested in the cutter as part owner and it is contended that in complying with the request of the conductor he assumed all responsibility because, in doing so, he simply discharged a duty imposed by a rule filed with the Interstate Commerce Commission, requiring owners of heavy freight, under stated circumstances, to unload it. The evidence, however, not only tends to show that conditions requiring compliance with the rule were absent, but the point is immaterial in view of the finding of the jury to the effect that Burtch assisted in the work not as owner but in the capacity of an employee. Observance of the rule in question is required only to prevent discrimination among shippers. It has nothing to do with the interrelations of the carrier and its employees.

Moreover, the failure to enforce the rule, if such there was, constituted no part of the causal sequence of events. Such failure would be merely an attendant circumstance, neither causing nor contributing to cause the injury, which, on the contrary, came about as the result of physi-

cal facts and conditions wholly apart therefrom. If, therefore, a violation of the rule be assumed it would not avail to relieve the company from a liability which would otherwise exist. See *Moran* v. *Dickinson,* 204 Mass. 559, 562; *Newcomb* v. *Boston Protective Department,* 146 Mass. 596; *Currelli* v. *Jackson,* 77 Conn. 115, 122.

Upon the facts now disclosed by the record the case is one arising under and governed by the Federal Employers' Liability Act and in that view it should have been submitted to the jury. The judgment of the State Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

LACOSTE ET AL. v. DEPARTMENT OF CONSERVATION OF THE STATE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 65. Argued October 11, 1923.—Decided January 7, 1924.

1. By right of ownership, and in the exercise of police power, a State may regulate the taking of wild animals within its borders, their subsequent use, and the property rights that may be acquired in them. P. 549.
2. The question whether a state law interferes with or burdens interstate commerce, is determined here with regard to the substance of the law; its form, or its characterization by the state legislature or courts, do not necessarily control. P. 550.
3. In the exertion of its police power to protect wild animals for the common benefit, a State may require payment of a tax upon their skins or hides as a condition precedent to transfer of its title to the dealer paying the tax. *Id.*
4. The fact that such skins or hides are intended to be shipped out of the State without preliminary manufacture does not prevent their taxation by the State while in the hands of dealers and before they move in interstate commerce. P. 551. *Coe* v. *Errol,* 116 U. S. 517.
5. Nor does the fact that the law, for certainty of execution, taxes the hides or skins in the hands of the dealer who ships them out

of the State, or buys them for that purpose or to sell them for manufacture within the State, rather than taxing them in the hands of the trapper or buyer from whom the dealer procures them, constitute it an interference with interstate commerce. P. 551.

6. A law imposing such a tax does not violate due process of law by delegating to an administrative body the authority to ascertain the prices of skins and hides paid by the dealer, determine the time and manner in which the tax shall be paid, and adopt and enforce reasonable rules and regulations not contrary to the act, in relation to the collection of the tax. *Id.*

7. Wild animals taken and possessed with the permission of a State, upon prescribed conditions, may reasonably be distinguished from other classes of property, so that their skins and bodies may be taxed to dealers therein, consistently with equal protection of the laws, without imposing similar taxes on other kinds of property belonging to merchants. P. 552.

8. A State has great latitude in choosing the means for protecting wild life within its borders. *Id.*

151 La. 909, affirmed.

ERROR to a judgment of the Supreme Court of Louisiana which affirmed a judgment dismissing a suit brought by Lacoste et al., to enjoin the State Department of Conservation from enforcing payment of a severance tax.

Mr. Morris B. Redmann and *Mr. Edwin T. Merrick,* with whom *Mr. Ralph J. Schwarz* was on the brief, for plaintiffs in error.

Mr. Paul A. Sompayrac, Assistant Attorney General of the State of Louisiana, with whom *Mr. A. V. Coco,* Attorney General, was on the brief, for defendant in error.

Mr. Justice BUTLER delivered the opinion of the Court.

Plaintiffs in error are severally engaged in Louisiana in the business of buying, selling, importing, exporting and dealing in hides, skins and furs, some of which come from wild furbearing animals and alligators in that

State. They brought this suit in the Civil District Court of the Parish of Orleans to enjoin the defendant in error from enforcing the payment of a severance tax levied by Act 135 of the General Assembly of Louisiana, 1920.[1] By that act, all wild furbearing animals and alligators in the State, and their skins, are declared to be the property of the State until the severance tax thereon shall have been paid. A dealer is defined to be one who buys such

[1] The scope and substance of the act are indicated by its title, which is as follows:

AN ACT

Declaring the wild furbearing animals and alligators of this State to be the property of the State, and the skins taken from such animals to be the property of the State until there shall have been paid to the State of Louisiana, through the Department of Conservation, the severance tax levied thereon by the provision of this Act; levying an annual license tax on persons, firms, corporations or associations of persons engaged in the buying of hides and skins taken from wild furbearing animals and alligators, and prohibiting the conduct of such business without such license; levying a severance tax of two (2c) cents on the dollar of and on the value of the hides and skins taken from the wild furbearing animals and alligators of this State; fixing the time when, by whom, and under what conditions such severance tax shall be paid; defining the time and making an open season for the trapping of all furbearing animals and the taking and killing of alligators in this State; to allow licensed trappers to hunt wild game without additional license; to prohibit persons, firms, corporations, or associations from shipping or selling hides or skins taken from wild furbearing animals or alligators of this State unless said severance tax is paid thereon; requiring all persons dealing in hides and skins taken from wild furbearing animals and alligators of this State to keep record of all receipts and sales of said hides and skins and to make reports of same to the Department of Conservation; to define trappers, fur dealers, fur buyers, resident and non-resident; to authorize the Department of Conservation to adopt rules and regulations providing for the collecting of the severance tax and licenses herein imposed and regulating the handling and disposition of all hides and skins of furbearing animals and alligators; to provide penalties for the violation of this Act and to repeal all conflicting laws.

skins and hides from either a trapper or a buyer and ships them from the State, or sells them for manufacture into a finished product in the State, or one who ships or carries them out of the State. Section 3 levies a severance tax of two per cent. on the value of all skins and hides taken from wild furbearing animals or alligators within the State, to be paid by the dealer to the State through the Department of Conservation. By other sections, trappers, buyers and dealers are required to pay license fees and to furnish to the department information concerning their respective occupations; an open season is fixed in each year for the taking of furbearing animals and alligators respectively, and such taking is prohibited at other times.

In their complaint, the plaintiffs in error aver that the defendant in error demands and proposes to enforce payment of the severance tax. They declare that they are willing to pay the license fee under protest and without conceding the validity of the act, but that defendant in error has refused to accept such payment or to issue licenses until the severance tax shall have been paid. It is set forth that the defendant in error has formulated rules and regulations requiring all shipments of such skins and hides to have attached thereto a certificate or label issued by the defendant in error, showing the payment of the severance tax, and prohibiting any carrier from accepting such shipments if not so labeled. It is alleged that defendant in error is about to seize and confiscate all shipments of skins and hides to be made by plaintiffs in error, and that such seizure would be illegal and would constitute a taking of property without due process of law, and would inflict upon them irreparable injury and damages, leaving them without remedy therefor.

Defendant in error moved to dismiss the suit on the ground that the complaint failed to state a cause of ac-

tion, and the District Court granted the motion. The case was taken on appeal to the Supreme Court of Louisiana, and that court denied all contentions of plaintiffs in error, including one that the act is repugnant to the commerce clause of the Constitution of the United States and to the Fourteenth Amendment, and affirmed the judgment.

The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein. *Geer* v. *Connecticut,* 161 U. S. 519, 528; *Ward* v. *Race Horse,* 163 U. S. 504, 507; *Silz* v. *Hesterberg,* 211 U. S. 31, 39; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 143; *Kennedy* v. *Becker,* 241 U. S. 556, 562; *Carey* v. *South Dakota,* 250 U. S. 118; *State* v. *Rodman,* 58 Minn. 393, 400.

Whether the tax here involved might be upheld by virtue of the power of the State to prohibit, and therefore to condition, the removal of wild game from the State, we do not now consider; but dispose of the case upon other grounds. The commerce clause (Article I, § 8, cl. 3) confers on Congress power to regulate interstate and foreign commerce, and therefore such power is impliedly forbidden to the States. "Even their power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against such commerce." *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596, and cases cited; *Kansas City, &c. Ry. Co.* v. *Kansas,* 240 U. S. 227, 231; *Brimmer* v. *Rebman,* 138 U. S. 78, 82; *Elmer* v. *Wallace,* 275 Fed. 86, 90; *State* v. *Ferrandou,* 130 La. 1035, 1041. A State may not enforce any law, the necessary effect of which is to prevent, obstruct or burden interstate commerce. *Pennsylvania*

v. *West Virginia, supra,* 596, 597, and cases cited. The Supreme Court of Louisiana held that the act here in question is a police regulation and not a revenue act; that its object is to conserve and protect all furbearing animals and alligators within its borders, including their skins and hides; that the various subdivisions of the act relate to that object, and that payment of the tax is a condition precedent to the divestiture of the State's title and its transfer to the dealer paying the tax. The court said, in substance, that the tax is necessarily levied upon dealers, as they have established places of business, make inventories, and are easily accessible for the purpose of collection, and pointed out the difficulties in the way of levying the charge, at the time of the severing of the skins or hides, on itinerant trappers with no fixed place of abode or business.

This Court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the State will not necessarily control. Regard must be had to the substance of the measure rather than its form. *Looney* v. *Crane Co.,* 245 U. S. 178, 189, *et seq.; Kansas City, &c. Ry. Co.* v. *Kansas, supra; St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335, 346; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, 227. Our examination of this act discloses no reason why the decision of the state court should be disturbed. The legislation is a valid exertion of the police power of the State to conserve and protect wild life for the common benefit. It is within the power of the State to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership. Expressly, the tax is imposed upon all skins and hides taken within the

State. This includes those, if any, sold for manufacture in the State as well as those shipped out. In their argument here, plaintiffs in error stated that skins and hides are not manufactured into finished products in Louisiana, and that all are shipped out of the State. But that is no objection to the tax. The State's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce. Such skins and hides may be taxed while in the hands of dealers before they move in interstate commerce. *Coe* v. *Errol,* 116 U. S. 517, 525; *Bacon* v. *Illinois,* 227 U. S. 504, 515–516; *Arkadelphia Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 151. Failure to levy and enforce the tax before the skins and hides reach the dealers does not make the necessary operation and effect of the law an interference with interstate commerce. The imposition of the tax on the skins and hides while in the hands of the dealers is calculated to make certain that all will be found for taxation. No interference with interstate commerce results from the enforcement of the act. It is not repugnant to the commerce clause of the Constitution.

Plaintiffs in error contend that the act violates the due process and equal protection clauses of the Fourteenth Amendment. They argue that legislative authority is improperly delegated to, and that arbitrary power is conferred upon, the Department of Conservation, and that the severance tax is bad because imposed on such dealers in addition to property and license taxes that are imposed on merchants generally.

These contentions are without merit. The act provides " that there be and is hereby levied a severance tax of two (2c) cents on the dollar on and of the value of all skins or hides taken from any wild furbearing animals or alligators within this State, which severance tax shall be paid by the dealer . . . under such rules and regulations as shall be determined by the Department of Con-

servation. . . ." That department is authorized to ascertain purchase prices of skins and hides paid by the dealer, to determine the time when and the manner in which the tax shall be paid, and to adopt and enforce rules and regulations not contrary to the act in relation to the collection of the tax. It is not shown that defendant in error has made, or proposes to apply, any unreasonable, capricious or arbitrary rules, regulations or methods of valuation for the purpose of arriving at the amount of the tax or for enforcing its payment. The Fourteenth Amendment does not require equality of taxation within the State or prevent the laying of special or additional taxes upon defined classes of property, so long as the inequality is not based upon arbitrary distinctions. It does not prohibit state legislation imposing a severance tax upon such skins and hides, even if no similar or corresponding tax is levied upon other property of merchants. *St. Louis Southwestern Ry. Co.* v. *Arkansas, supra,* 367, and cases cited. *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304, 315; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121; *Cook* v. *Marshall County,* 196 U. S. 261, 274. Wild animals permitted by the State to be taken and reduced to possession on prescribed conditions may reasonably be distinguished from other classes of property. Compare *Geer* v. *Connecticut, supra; Ohio Oil Co.* v. *Indiana* (No. 1), 177 U. S. 190, 208. The Fourteenth Amendment does not interfere with the proper exercise of the police power. *Barbier* v. *Connolly,* 113 U. S. 27, 31; *Mugler* v. *Kansas,* 123 U. S. 623, 663; *Powell* v. *Pennsylvania,* 127 U. S. 678, 683; *In re Rahrer,* 140 U. S. 545, 555; *Reinman* v. *Little Rock,* 237 U. S. 171, 177. Protection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection.

The act is not repugnant to the due process or equal protection clauses of the Fourteenth Amendment.

Judgment affirmed.

GILES ET AL. *v.* VETTE ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 59. Argued October 9, 10, 1923.—Decided January 7, 1924.

1. A limited partnership could not be formed under the Illinois Limited Partnership Act of 1874, until the certificate had been filed in the office of the county clerk. P. 559.
2. Where this was not done until the Uniform Limited Partnership Act (1917) had displaced the Act of 1874, and the plan was to conduct a brokerage business, a purpose not authorized under the later act, the attempt to form a limited partnership was abortive. *Id.*
3. In Illinois, the question of partnership, as between the parties, is one of intention, to be gathered from the facts and circumstances. *Id.*
4. Persons who contributed capital to a firm and received profits, but under a legally ineffectual agreement for a limited partnership and without real or apparent authority to bind the firm, and who returned the dividends with interest when it became bankrupt, *held* not to have become general partners under the Uniform General Partnership Act, Illinois, 1917. P. 560.
5. Mere representation, on mistaken belief, that one is a limited partner, will not make him liable as a general partner to creditors of the firm, who were not injured thereby. General Partnership Act, *supra*, § 16. P. 561.
6. Section 11 of the Uniform Limited Partnership Act, Illinois, providing that a person who has contributed to the capital of a business erroneously believing that he has become a limited partner shall not, by reason of his exercise of the rights of a limited partner, be deemed or held liable as a general partner, provided, on ascertaining the mistake, he promptly renounces his profits in the business, etc.,—should be construed liberally, and not restricted to cases where there were attempts to organize limited partnerships under that act. *Id.*
7. Under the act last cited, § 6, a false statement in a limited partnership certificate, does not create liability in favor of creditors not shown to have suffered loss by reliance upon it. P. 564.

281 Fed. 928, affirmed.

CERTIORARI to an order or decree of the Circuit Court of Appeals modifying an order of the District Court, which adjudged the respondents here to be partners, and sent the case to the referee for findings of fact as to insolvency. The petitioners here were the creditors.

Mr. William Burry and *Mr. Guy M. Peters,* with whom *Mr. Julius Moses* and *Mr. Lewis F. Jacobson* were on the briefs, for petitioners.

Mr. George T. Buckingham, with whom *Mr. Harry P. Weber, Mr. George W. Miller, Mr. Donald Defrees* and *Mr. Stephen E. Hurley* were on the brief, for Vette et al., respondents.

Mr. Horace Kent Tenney, with whom *Mr. Charles F. Harding, Mr. Roger Sherman, Mr. Carl Meyer* and *Mr. Henry Russell Platt* were on the brief, for executors of Hecht et al., respondents.

Mr. Justice BUTLER delivered the opinion of the Court.

On March 11 and 12, 1920, creditors filed petitions in bankruptcy against Marcuse & Company, and a receiver was appointed. The bankruptcy court found that the firm was composed of Marcuse, Morris, Hecht, Finn, Vette, Zuncker, Regensteiner, Clement Studebaker, Jr. and George M. Studebaker, and sent the case to the referee, directing findings of fact as to insolvency. The case was taken to the Circuit Court of Appeals on petition to review and revise that finding and order. That court eliminated from the order the names of all except Marcuse and Morris. 281 Fed. 928. This Court granted a writ of certiorari on petition of creditors. 260 U. S. 712. The question for decision is whether any of the persons named, other than Marcuse and Morris, are liable as general partners.

Marcuse had been a member, and Morris had been an employee, of the firm of Von Frantzius & Company, brokers, at Chicago, which suspended business because of the death of Von Frantzius. In April, 1917, settlement of the estate of Von Frantzius was pending in Probate Court. Proceedings in bankruptcy were pending against Von Frantzius & Company. There were many creditors of the firm, and it was indebted in large amounts to the respondents other than Vette and Zuncker. Marcuse desired to organize a new brokerage firm to carry on business in the place formerly occupied by his old firm. It was proposed that a limited partnership be formed under the Illinois Limited Partnership Act of 1874, and to that end, a form of agreement was prepared, and nine originals were signed by Marcuse, Morris, Hecht, Finn, Vette, Zuncker, Regensteiner and Hoffman (in his own name, but in fact representing the Studebaker interest).

In advance of the consummation of this agreement, Marcuse was to arrange with creditors of the firm that the assets of the Von Frantzius estate be turned over to him, as trustee, on his giving bond and making certain payments for the protection of the administrators. He was to obtain assignments of the claims of creditors, in consideration of trust certificates issued by him containing his agreement to pay off the creditors who did not accept such certificates, to organize a new partnership, to turn over the assets to the new firm for liquidation in the usual course of its business for account of the certificate holders, and, out of profits accruing to him as a member of the new firm, to pay any deficiency remaining after liquidation of the assets. This arrangement had not been completed at the time of the signing of the partnership agreement. The signed agreements were placed *in escrow* not to be delivered until conclusion of arrangements for the delivery to Marcuse of all

the assets of Von Frantzius, excepting an amount to indemnify against claims of non-assenting creditors, and to pay the expenses of administration, and until dismissal of the bankruptcy proceedings.

The proposed agreement provided for a limited copartnership under the name of Marcuse & Company, to commence business on April 2, 1917, and to continue for five years. Marcuse and Morris were to be general partners. The other signers were to be limited partners. Marcuse was to contribute a membership in the New York Stock Exchange, in addition to cash and other property. Morris was to contribute $10,000. Contributions were to be made by the limited partners as follows: Hecht $25,000, Finn $31,500, Vette $30,000, Zuncker $25,000, Regensteiner $28,500, and Hoffman (in fact the Studebaker interest) $50,000,—amounting in all to $190,000. The general partners were to devote all their time to the business and were permitted to draw specified sums each year to be charged to expenses. Each partner, general and limited, was to have six per cent. on capital contributed by him. Morris was to have ten per cent. of the net profits. There was to be paid to Marcuse twenty-five per cent. of the net profits, to be used by him to pay off his trust certificates covering the debts of Von Frantzius & Company. The rest was to be divided among the partners, except Morris, in the proportions in which they had contributed capital.

Shortly after the deposit *in escrow,* Marcuse learned that the New York Stock Exchange would not admit to membership a firm having more than two limited partners, but would not object to a firm having only two limited partners who were not engaged in other business. This was reported to the others, and the matter of consummating the proposed partnership agreement was dropped.

But Marcuse did not abandon the idea of organizing a new firm, and, after conferences and lapse of some time,

another limited partnership agreement for a firm of the same name was prepared conformably to the Act of 1874. Marcuse, Morris, Hecht and Finn were the parties to the new agreement. It was dated—as was the former—April 2, 1917, and was signed June 30 of that year. Marcuse and Morris were general partners and agreed to contribute capital as in the proposed former agreement. Hecht and Finn were named as limited partners, and each agreed to contribute $95,000. The liability of each was expressly limited to the amount contributed by him. The term was five years from July 1, 1917. Rights, duties and immunities of the general and limited partners were substantially as stated in the first draft.

On the same day, and as a part of the same transaction, there was signed an instrument known as the Hecht-Finn trust agreement. The limited partnership agreement was made a part of it, and a copy was attached. It recited that Hecht and Finn would be entitled to certain payments and distributions of income and assets of the copartnership, and declared that they held the same as trustees. The agreement directed payment to the Chicago Title and Trust Company of all funds at any time payable to Hecht and Finn under the partnership agreement, or by way of distribution on dissolution. It directed the trust company to distribute all funds to the holders of certain trust certificates for 380 shares of the initial value of $500 per share to be issued by Hecht and Finn, in accordance with the agreement, as follows: To Hecht 50 shares, Finn 63 shares, Vette 60 shares, Zuncker 50 shares, Regensteiner 57 shares, and Hoffman (for the Studebaker interest) 100 shares. Certificate holders were entitled to have access to the books, to have an inventory and account once a year, and a trial balance monthly. Hecht and Finn were to appoint such auditors as the holders of certificates should designate. On the report of the auditors and the direction of the certificate holders,

they were authorized to take steps to dissolve the firm, if the business was not conducted conservatively or was neglected or mismanaged. It was provided that the certificate holders should "have no right, title or interest, directory, proprietary or otherwise, in the said copartnership or in or to the property or assets of said copartnership . . . ", and that "the interest of each . . . holder of trust certificates shall consist solely of the right to receive his proportionate share of the net part or parts of the trust fund from time to time payable to the trust company hereunder; . . ." This agreement was signed by Hecht and Finn; there was attached to it an agreement signed by Marcuse, Morris, Hecht and Finn to do all things necessary to carry out the trust, and the trust company accepted the duties imposed upon it.

On the same day—June 30, 1917—Hecht delivered his check to Marcuse & Company for $25,000 and Finn his check for $31,500. And checks were delivered to Hecht and Finn by Vette for $30,000, by Zuncker for $25,000, by Regensteiner for $28,500, and by Hoffman (for the Studebaker interest) for $50,000. These checks were handed over to Marcuse & Company, making up a total of $190,000.

On Monday, July 2, the certificate of limited partnership was filed in the office of the county clerk. The new firm commenced business on that day. All the letterheads and other papers of the firm indicated that Marcuse and Morris were general partners and that Hecht and Finn were limited partners. Hecht and Finn took no part in the control of the business. Marcuse and Morris exercised exclusive control and carried on the business. The Hecht-Finn trust agreement was unknown to persons dealing with the firm. It does not appear that any of the creditors understood or had any reason to believe that the arrangement was other than as shown by the partnership agreement.

From time to time, while it was a going concern, the firm paid dividends on the capital contributed. After bankruptcy proceedings had been commenced against Marcuse & Company, Hecht and Finn, in accordance with § 11 of the Uniform Limited Partnership Act, hereafter quoted, renounced their interest in the profits of the business or other compensation by way of income. They also paid $46,000 into court for the benefit of the alleged bankrupt estate. This amount was sufficient to cover all dividends paid on the $190,000, so contributed to the capital of the business, with interest on such dividends from the times of payment.

Are Hecht and Finn liable as general partners?

No limited partnership was formed. On July 1, 1917, the Illinois Limited Partnership Act of 1874 was repealed, and there was substituted for it the Uniform Limited Partnership Act (Hurd's Revised Statutes, 1919, c. 106a, §§ 45–75). The Uniform (General) Partnership Act (*id.* §§ 1–45) became effective on the same day. The Act of 1874 provided that no limited partnership should be deemed to have been formed until the certificate should be filed in the office of the county clerk. The first effort to form a limited partnership was given up. The final effort failed because the certificate was not filed until after the repeal of the Act of 1874. Limited partnerships organized under the Act of 1917 are not authorized to do a brokerage business, and no attempt was made to organize under it.

Hecht and Finn were not partners as to Marcuse and Morris. It is well settled in Illinois that, as between the parties, the question of partnership is one of intention to be gathered from the facts and circumstances. *Goacher* v. *Bates*, 280 Ill. 372, 376; *National Surety Co.* v. *Townsend Brick Co.*, 176 Ill. 156, 161; *Grinton* v. *Strong*, 148 Ill. 587, 596; *Lycoming Insurance Co.* v. *Barringer*, 73 Ill. 230, 233, 234; *Smith* v. *Knight*, 71 Ill.

148, 150. See also *London Assurance Co.* v. *Drennen*, 116 U. S. 461, 472. The Uniform (General) Partnership Act provides: "A partnership is an association of two or more persons to carry on as co-owners a business for profit." Section 6 (1). ". . . persons who are not partners as to each other are not partners as to third persons." Section 7 (1). ". . . common property or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property." Section 7 (2). "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business . . ." Section 7 (4).

Hecht and Finn did not carry on the business of the firm as co-owners or otherwise. They had no authority, actual or apparent, to act for or bind the copartnership. The agreements of the parties, their subsequent conduct, the repayment of dividends received with interest, together with the other facts and circumstances above alluded to, are more than sufficient to rebut and overcome any inference legitimately resulting from the receipt of a share of the profits. The provisions of the agreement giving respondents right to have access to the books of the firm, to have statements, to appoint auditors and, in the event specified, to call for a dissolution, were appropriate in a limited partnership. See § 19, Act of 1874; § 10, Uniform Limited Partnership Act. Under the circumstances, these provisions do not indicate any intent on the part of Hecht and Finn to become general partners or support petitioners' contention that they are liable as partners.

As to third parties, they cannot be held liable as general partners.

Section 16 of the Uniform (General) Partnership Act provides that: "When a person . . . represents himself, or consents to another representing him to any one,

as a partner in an existing partnership . . . , he is liable to any such person . . . who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable . . ." There was no such representation of Hecht or Finn to any person or to the public. On the contrary, they were published to the world as limited partners. It is true that they were not. But no person could have been misled to his disadvantage by the statement that they were. Representation on mistaken belief that they were limited partners was not a holding out as general partners. The lack of power of a limited partnership created under the later act to carry on a brokerage business gives no additional significance to the representations. The firm was not held out as having been organized under that act. The failure to complete the organization did not injure any persons dealing with the firm. Creditors are as well off as if the limited partnership had been perfected. The $190,000 handed over by Hecht and Finn was not withdrawn. Hecht and Finn did not intend or agree to become general partners. The things intended and done do not constitute a partnership. They did nothing to estop them from denying liability as such. The case is not doubtful. But if it were, their intent should be followed. *Beecher* v. *Bush,* 45 Mich. 188, 193. See also *Post* v. *Kimberly,* 9 Johns. 470, 502, *et seq.* To hold them liable as general partners would give creditors what they are not entitled to have, and would impose on Hecht and Finn burdens that are not theirs to bear.

Moreover, we think that § 11 of the Uniform Limited Partnership Act was applicable and was properly invoked by Hecht and Finn. It provides:

"A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights

of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

Prior to the taking effect of that act, the courts of Illinois held that at common law all partners were liable without limitation for the debts of the firm, and that, in order to limit such liability, the statute authorizing limited partnerships must be complied with, or all those who associated under it would be liable as general partners. *Henkel* v. *Heyman*, 91 Ill. 96, 101; *Manhattan Brass Co.* v. *Allin*, 35 Ill. App. 336, 341; *Walker* v. *Wood*, 69 Ill. App. 542, 549, affirmed 170 Ill. 463; *Cummings* v. *Hayes*, 100 Ill. App. 347, 353. And this is in harmony with decisions elsewhere under statutes similar to the Illinois Act of 1874.[1] These cases illustrate how strictly the common law rule against limitation of liability was applied, and how far the doctrine of constructive partnership was carried. It was thought that the strictness of the old act and decisions under it impaired the usefulness of limited partnerships as business organizations because of the risk that one contributing capital as a limited partner might be held liable without limitation.[2] The Uniform Limited

[1] *Pierce* v. *Bryant*, 5 Allen, 91, 94; *Haggerty* v. *Foster*, 103 Mass. 17; *Argall* v. *Smith*, 3 Denio, 435, affirming 6 Hill, 479, 481; *Durant* v. *Abendroth*, 69 N. Y. 148, 152; *In re Merrill*, 12 Blatchf. (U. S.) 221, 223; *Richardson* v. *Hogg*, 38 Pa. St. 153; *Vanhorn* v. *Corcoran*, 127 Pa. St. 255, 268; *In re Allen*, 41 Minn. 430; *Lineweaver* v. *Slagle*, 64 Md. 465, 483; *Holliday* v. *Union Bag and Paper Co.*, 3 Colo. 342, 344; *Oglesby Co.* v. *Lindsey*, 112 Va. 767, 776.

[2] See explanatory note as to the Uniform Limited Partnership Act, submitted with the act to the Illinois legislature.

The Uniform Limited Partnership Act has been adopted by Alaska, Illinois, Maryland, Pennsylvania, Tennessee, Virginia, Idaho, Iowa, Minnesota, New Jersey, Utah and Wisconsin. See Terry, Uniform State Laws, Annotated.

Partnership Act and the Uniform (General) Partnership Act, passed at the same time, relax the strictness of the rules against limitation of liability. Each provides that the rule that statutes in derogation of the common law are to be strictly construed shall have no application to it, and that the act shall be so interpreted and construed as to effect the general purpose to make uniform the laws of those States which adopt it. See § 28, Uniform Limited Partnership Act; § 4, Uniform (General) Partnership Act.

Hecht and Finn contributed to the capital of the business, and each erroneously believed that he had become a limited partner in a limited partnership. Neither took any part in the control of the business or exercised any rights or powers in respect of it other than those which might belong to one not a general partner. See § 19, Act of 1874; § 10, Uniform Limited Partnership Act. They made the renunciation provided for. No person suffered any loss or disadvantage because it was not made earlier, or because of reliance on any statement in the certificate. All dividends paid on the $190,000 were returned. It need not be decided whether such return was necessary.

Section 11 is broad and highly remedial. The existence of a partnership—limited or general—is not essential in order that it shall apply. The language is comprehensive and covers all cases where one has contributed to the capital of a business conducted by a partnership or person erroneously believing that he is a limited partner. It ought to be construed liberally, and with appropriate regard for the legislative purpose to relieve from the strictness of the earlier statutes and decisions. See *Logan* v. *Davis*, 233 U. S. 613, 627, 628; *United States* v. *Colorado Anthracite Co.*, 225 U. S. 219, 223; *United States* v. *Southern Pacific R. R. Co.*, 184 U. S. 49, 56. Its application should not be restricted to cases where there was an attempt to organize a limited partnership under that act.

The petitioners assert that § 11 does not apply because the limited partnership certificate filed July 2, 1917, was false in that it did not disclose the names of all the limited partners or the amount of the contributions of each. Their contention is that the other respondents were represented by Hecht and Finn, and that all should have been named in the certificate as limited partners, and that the amount advanced by each of the respondents should have been stated as his contribution to the capital. But the Act of 1874 was repealed and the Uniform Limited Partnership Act was substituted for it before the certificate was filed and before the firm commenced business. Section 8 of the Act of 1874 provides that "if any false statement shall be made in such certificate . . . all the persons interested . . . shall be liable . . . as general partners." The later act is very different. It provides (§ 6): "If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false." We do not find that the certificate was false within the meaning of § 8. But even if it was inaccurate or false as asserted, liability of Hecht and Finn or the other respondents as general partners does not follow, because the Act of 1874 was superseded, and because it is not shown that any creditors suffered loss by reliance upon any statement in the certificate.

It must be held that Hecht and Finn are not liable as general partners.

Petitioners contend that the respondents other than Hecht and Finn are liable as general partners. They argue that in the attempt to form the limited partnership under the agreement signed June 30, Hecht and Finn were acting as the representatives of the other respondents; that the earlier agreement signed by all and placed *in escrow* was not abandoned, and that the limited partnership agreement and the Hecht-Finn trust agreement

signed June 30 were calculated and intended to circumvent the rule of the New York Stock Exchange above referred to, without altering the substance of the plan of organization evidenced by the first agreement. But from the conclusion that Hecht and Finn are not liable as general partners, it necessarily follows that the other respondents cannot be held liable as such.

The decree of the Circuit Court of Appeals is

Affirmed.

FEDERAL TRADE COMMISSION *v.* RAYMOND BROS.-CLARK COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 102. Argued November 27, 1923.—Decided January 7, 1924.

In the absence of any element of conspiracy, monopoly or oppression, a wholesale dealer, in interstate commerce, has a right to stop dealing with a manufacturer if he thinks that the manufacturer is undermining his trade by selling to a competing wholesaler or to a retailer competing with his customers; and such conduct is not an unfair method of competition within the meaning of the Trade Commission Act. P. 572.

280 Fed. 529, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals which set aside an order of the Federal Trade Commission.

Mr. Adrien F. Busick, with whom *Mr. Solicitor General Beck* and *Mr. W. H. Fuller* were on the brief, for petitioner.

The decision of this Court in *Federal Trade Comm.* v. *Gratz,* 253 U. S. 421, interpreted the substantive law of the Trade Commission Act as creating two classes of practices which are unfair within the meaning of the statute, first, those which are contrary to good morals because characterized by deception, bad faith, fraud, or op-

pression, and, second, those which have a dangerous tendency unduly to hinder competition. Subsequently, in *Federal Trade Comm.* v. *Beech-Nut Co.*, 257 U. S. 441, this Court held the "Beech-Nut System of Merchandising" to be an unfair method of competition because of its effect to restrict competition. Again, in *Federal Trade Comm.* v. *Winsted Hosiery Co.*, 258 U. S. 483, the use of false brands or labels was held to be an unfair method of competition, the basis of the illegality of the method being its deceptive character. These decisions firmly establish the criteria for the interpretation of the act.

This proceeding involves "involuntary" restraints of trade; and control of the market by respondent need not be shown. *United States* v. *Patten*, 226 U. S. 525; *Loewe* v. *Lawlor*, 208 U. S. 274; *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502; *Steers* v. *United States*, 192 Fed. 1.

The practice burdens interstate commerce, hinders competition, and destroys that equality of opportunity to compete which it was the purpose of the Trade Commission Act to preserve. *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600; *Duplex Co.* v. *Deering*, 254 U. S. 443.

The evidence clearly shows that there was an existing interstate traffic between manufacturers of various States and the Basket Stores Company, and that for the direct purpose of destroying such traffic petitioner sought to induce the Snider Company to cease selling its products to the Basket Stores Company. Obviously, if respondent's efforts had been successful, there would have been no more sales by the Snider Company to the Basket Stores Company, and interstate traffic between them would have ceased, the free flow of commerce between the States would have been obstructed, and the trade of the Basket Stores Company would have been restrained. See *Swift & Co.* v. *United States*, 196 U. S. 375; *Montague & Co.* v. *Lowry*, 193 U. S. 38.

The methods employed were oppressive within the *Gratz Case*. If a corporation engaged in interstate commerce may employ the strength of its buying power to prevent another from procuring a commodity in interstate commerce upon which the very existence of the latter's business depends, it may follow such practices until the dealer against whom they are directed finds himself unable to purchase any commodities and automatically retires from business. By a similar line of conduct, a rival could not only be prevented from purchasing commodities but from securing advertising space in newspapers and magazines, and the channels of commerce completely closed to him.

Such methods destroy that equality of opportunity to compete in business which it was the great purpose of the Trade Commission Act and of cognate statutes to preserve. *United States* v. *American Oil Co.*, 262 U. S. 371; *United States* v. *Freight Assn.*, 166 U. S. 290; *United States* v. *International Harvester Co.*, 214 Fed. 987.

Traders should have large freedom of action in the conduct of their own affairs. *Federal Trade Comm.* v. *Curtis Pub. Co.*, 260 U. S. 568; *Federal Trade Comm.* v. *Sinclair Refg. Co.*, 261 U. S. 463. But the line which separates fair competition from that which is unfair is clear. *Hitchman Coal Co.* v. *Mitchell*, 245 U. S. 229; *American Bank & Trust Co.* v. *Federal Reserve Bank*, 262 U. S. 643; *Sears-Roebuck Case*, 258 Fed. 307; *National Harness Manufacturers Case*, 268 Fed. 705.

The use of the methods here employed constitutes an unwarranted interference with the Basket Stores' right at common law to a free market. *Martell* v. *White*, 185 Mass. 255; *Brown & Allen* v. *Jacobs Co.*, 115 Ga. 429; *Booth* v. *Burgess*, 72 N. J. Eq. 181; *Quinn* v. *Leathem*, (1901) A. C. 495; Pollock, The Law of Torts, 10th ed., p. 163; *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1; *People* v. *Butler*, 221 Mich. 626.

No question of respondent's right to refuse to deal with others is involved in this case.

There was an illegal interference with established business relations. *Truax* v. *Raich,* 239 U. S. 33, 38; *Hitchman Coal Co.* v. *Mitchell,* 245 U. S. 229, 252.

The practice being inherently illegal, no tendency to monopoly need be proven.

The existence of public interest in the case has been committed by the statute to the Commission as a matter preliminary to the issuance of a complaint and moving it to action or nonaction. There is ample public interest here.

Mr. Emmet Tinley, Mr. W. E. Mitchell, Mr. D. L. Ross and *Mr. Edwin D. Mitchell* appeared for respondent.

Mr. Justice SANFORD delivered the opinion of the Court.

This writ brings up for review a decree of the Circuit Court of Appeals which set aside an order of the Federal Trade Commission requiring the Raymond Bros.-Clark Company to desist from a method of competition held to be prohibited by the Trade Commission Act of September 26, 1914, c. 311, 38 Stat. 717.

By § 5 of that act " unfair methods of competition " in interstate commerce are declared unlawful, and the Commission is empowered and directed to prevent their use.

The Commission, in January, 1920, issued a complaint charging the Raymond Company with acts and practices the purpose and effect of which were to cut off the supplies purchased by the Basket Stores Company, a competitor, from the T. A. Snider Preserve Company, stifle and prevent competition by the Stores Company, and interfere with the right of the Stores Company and the Snider Company to deal freely with each other in interstate commerce. The Raymond Company answered, and evidence was taken. The Commission made a report, stating its findings of fact and conclusions.

The material facts shown by the findings are: The Raymond Company and the Stores Company are dealers in groceries, with their principal places of business and warehouses in Nebraska. They buy groceries in wholesale quantities from manufacturers in other States, which are shipped to their warehouses and resold to customers within and outside of Nebraska. Each does an annual business of approximately $2,500,000. The Raymond Company sells exclusively at wholesale. The Stores Company operates a chain of retail stores, but also sells at wholesale. In its wholesale trade, which constitutes about ten per cent. of its total business, it is a competitor of the Raymond Company. The Snider Company is a manufacturer of groceries, with its office in Illinois. In September, 1918, it sold groceries to the Raymond Company, the Stores Company and other neighboring dealers. These groceries were shipped in interstate commerce in a "pool" car to the Raymond Company, for distribution among the several purchasers.[1] The Raymond Company, upon thus learning of the sale to the Stores Company, delayed the delivery of its portion of the groceries, to the hindrance and obstruction of its business, and wrote to the Snider Company, protesting against the sale direct to the Stores Company and asking for the allowance of the jobber's profit on such sale.[2] Later, the Raymond Company declined to pay the Snider Company until this commission was allowed, and threatened to cease business with it and return all goods purchased from it then

[1] The facts that the Snider Company's office is in Illinois and that it shipped these groceries in interstate commerce, are not stated in the findings; but they otherwise appear in the record and are not disputed.

[2] It otherwise appears from the record that the ground of its protest and claim was its assertion that the Stores Company was "nothing but a retail store."

in stock, unless it allowed this commission and discontinued direct sales to the Stores Company; and, thereafter, an attempted settlement of the controversy having failed, the Raymond Company ceased to purchase from the Snider Company.

The conclusions of the Commission were: that the conduct of the Raymond Company tended to, and did, unduly hinder competition between the Stores Company and others similarly engaged in business; that the purpose of the Raymond Company was also to press the Snider Company to a selection of customers, in restraint of its trade, and to restrict the Stores Company in the purchase of commodities in competition with other buyers; and that the conduct of the Raymond Company tended to the accomplishment of this purpose.

The Commission thereupon adjudged that the method of competition in question was prohibited by the act, and ordered the Raymond Company to desist from directly or indirectly—hindering or preventing any person, firm, or corporation in or from the purchase of groceries or like commodities direct from the manufacturers or producers, in interstate commerce, or attempting so to do; hindering or preventing any manufacturer, producer, or dealer in groceries and like commodities in or from the selection of customers in interstate commerce, or attempting so to do; and influencing or attempting to influence any such manufacturer, producer, or dealer not to accept as a customer any firm or corporation with which, in the exercise of a free judgment, he has, or may desire to have, such relationship.

Upon a petition of the Raymond Company for review of this order, the Circuit Court of Appeals held that the findings of fact did not show an unfair method of competition by the Raymond Company as to the Stores Company or others similarly engaged in business. The court said: "There is no finding that petitioner combined with

any other person or corporation for the purpose of affecting the trade of the Basket Stores Company, or others similarly engaged in business. So far as petitioner itself is concerned, it had the positive and lawful right to select any particular merchandise which it wished to purchase, and to select any person or corporation from whom it might wish to make its purchase. The petitioner had the right to do this for any reason satisfactory to it, or for no reason at all. It had a right to announce its reason without fear of subjecting itself to liability of any kind. It also had the unquestioned right to discontinue dealing with any manufacturer, . . . for any reason satisfactory to itself or for no reason at all. Any incidental result which might occur by reason of petitioner exercising a lawful right cannot be charged against petitioner as an unfair method of competition." The decree setting aside the order of the Commission was thereupon entered. 280 Fed. 529.

We pass, without determination, the preliminary contentions of the Raymond Company, that the findings of the Commission are not supported by the testimony, in many respects,[3] and that, as both the complaint and the findings of fact relate merely to a controversy between it and a single manufacturer, over a single shipment of merchandise, the broad order of the Commission, commanding it to desist from all acts of like character with " the

[3] The Raymond Company insists that the testimony shows, among other things, that it did not intentionally delay the delivery of the groceries to the Stores Company; that the Stores Company is not its competitor in the wholesale business, but engaged in the retail business, selling groceries to consumers in competition with other retail dealers to whom the Raymond Company sells at wholesale; and that it did not threaten the Snider Company with the withdrawal of patronage if it continued to sell to the Stores Company, but merely expressed surprise at the change made by the Snider Company from its former policy of selling only to wholesalers, and declared that it would not have made its own purchases had it known of this change.

entire commercial world" is improvident, and can not be sustained.[4]

The gravamen of the contention in behalf of the Commission is that the conduct of the Raymond Company, acting alone and not in combination with others, in threatening the withdrawal of patronage from the Snider Company if it continued to sell goods to the Stores Company, constituted an unfair method of competition, oppressive in its character, unlawful when tested by common law criteria, and having a dangerous tendency unduly to hinder competition.

The words "unfair method of competition," as used in the act, "are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Federal Trade Comm.* v. *Gratz,* 253 U. S. 421, 427; *Federal Trade Comm.* v. *Beech-Nut Co.,* 257 U. S. 441, 453. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods, must be preserved. *Federal Trade Comm.* v. *Gratz, supra,* p. 429.

The present case discloses no elements of monopoly or oppression. So far as appears the Raymond Company has no dominant control of the grocery trade, and competition between it and the Stores Company is on equal terms. Nor do we find that the threatened withdrawal of its trade from the Snider Company was unlawful at the

[4] The Circuit Court of Appeals stated, in the outset of its opinion, that, in any event, as the proceeding related to the use of an unfair method of competition against the Stores Company, the order of the Commission, being "as broad as the business world," would have to be modified, if sustained in any particular. See *Federal Trade Comm.* v. *Gratz,* 253 U. S. 421, and *Western Sugar Refinery Co.* v. *Federal Trade Comm.* (C. C. A.), 275 Fed. 725, 732.

common law, or had any dangerous tendency unduly to hinder competition.

It is the right, "long-recognized", of a trader engaged in an entirely private business, "freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U. S. 300, 307. See also *United States* v. *Freight Assn.*, 166 U. S. 290, 320; *Dueber Watch-Case Co.* v. *Howard Watch Co.* (C. C. A.), 66 Fed. 637, 645; *Great Atlantic Tea Co.* v. *Cream of Wheat Co.* (C. C. A.) 227 Fed. 46, 48; *Wholesale Grocers' Ass'n* v. *Trade Comm.* (C. C. A.), 277 Fed. 657, 664; *Mennen Co.* v. *Trade Comm.* (C. C. A.), 288 Fed. 774, 780; *Booth* v. *Burgess*, 72 N. J. Eq. 181, 190; and 2 Cooley on Torts, (3d ed.) 587. Thus a retail dealer "has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself." *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600, 614; *United States* v. *Colgate & Co., supra*, p. 307. He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440. Or he may stop dealing with a wholesaler who he thinks is acting unfairly in trying to undermine his trade. *Eastern States Lumber Assn.* v. *United States, supra*, p. 614; *United States* v. *Colgate & Co., supra*, p. 307. Likewise a wholesale dealer has the right to stop dealing with a manufacturer "for reasons sufficient to himself." And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain.

A different case would of course be presented if the Raymond Company had combined and agreed with other

wholesale dealers that none would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers. An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy which may be prohibited if the result be hurtful to the public or to the individual against whom the concerted action is directed. *Grenada Lumber Co.* v. *Mississippi, supra,* p. 440; *Eastern States Lumber Assn.* v. *United States, supra,* p. 614. See also *Binderup* v. *Pathe Exchange, ante,* 291.

We conclude that the Raymond Company in threatening to withdraw its trade from the Snider Company exercised its lawful right, and that its conduct did not constitute an unfair method of competition within the meaning of the act. The decree of the Circuit Court of Appeals is accordingly *Affirmed.*

WILSON, COUNTY COLLECTOR OF TAXES FOR THE COUNTY OF MARION, ET AL. *v.* ILLINOIS SOUTHERN RAILWAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

No. 131. Argued January 3, 1924.—Decided January 14, 1924.

1. When the jurisdiction of the District Court rests solely upon a claim under the Constitution, the merits are open upon a direct appeal to this Court. P. 576.
2. A railroad company, alleging that its property had been overvalued by a state board, erroneously and fraudulently, and out of all proportion to other property, sued the collectors of five counties, among which the assessment had been apportioned, to restrain them from proceeding in their respective county courts to collect the taxes. *Held,* that in view of the many suits involved and the insuperable difficulty of determining through them the proper amount and apportionment of the assessment, the plain-

tiff's remedy by defense of those proceedings was not an adequate remedy at law. P. 576.

3. In a suit in the federal court to restrain collection of taxes upon the ground of fraudulent overassessment, a state statute authorizing review of assessments by appeal to a state court, but not clearly applicable where fraud is the ground, cannot be accepted as an adequate remedy ousting the equity jurisdiction. P. 577.

Affirmed.

Appeal from a decree of the District Court enjoining collection of taxes.

Mr. June C. Smith, with whom *Mr. Frank F. Noleman, Mr. Andrew J. Dallstream, Mr. Charles F. Dew, Mr. Hugh V. Murray, Mr. H. H. House, Mr. Judson E. Harriss* and *Mr. Logan F. Hachman* were on the brief, for appellants.

Mr. George B. Gillespie for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity to restrain the collection of taxes for the years 1917, 1918, 1919 and 1920, upon the track and rolling stock then belonging to the Illinois Southern Railway Company. It alleges that the property was erroneously and fraudulently overvalued, out of all proportion to the other taxable property in the State, and invokes the jurisdiction of the District Court on the ground that the Fourteenth Amendment of the Constitution is infringed. It alleges further that the sums that properly could have been charged have been paid, that if the additional amounts demanded could be recovered at all after payment it would be only by a multiplicity of suits against the taxing bodies of the several counties where the collections are made. It is argued that, in any proceeding at law in these counties, it would be impossible to secure a uniform or any adequate readjustment of the total valu-

ation, which is made by a state board, and so that equity only can afford adequate relief. The bill prays that the defendants, who are the collectors for five counties, may be restrained from applying to their respective county courts for judgments under the summary proceedings provided by statute for the collection of taxes on real estate (Cahill, Ill. Stat. 1923, c. 120, § 191), and that the Court will determine the amounts, if any, remaining equitably due and unpaid. The defendants ultimately relied upon a motion to dismiss for want of equity. The District Court granted an injunction as prayed, and the case is here on the single question whether the plaintiffs had an adequate remedy at law. When the jurisdiction of the District Court rests solely upon a claim under the Constitution, the merits are open on a direct appeal to this Court. *Holder* v. *Aultman,* 169 U. S. 81, 88. *Northwestern Laundry* v. *Des Moines,* 239 U. S. 486, 491. *McMillan Contracting Co.* v. *Abernathy, ante,* 438.

The appellants rely mainly upon *Keokuk & Hamilton Bridge Co.* v. *Salm,* 258 U. S. 122. In that case a bill charging fraudulent overvaluation was dismissed and the dismissal was affirmed by this Court on two grounds, that there was an adequate remedy at law and that the plaintiff had not tendered or offered to pay the amount confessedly due. The latter ground is absent here. As to the former it seems to us that the present case is to be distinguished. *Keokuk & Hamilton Bridge Co.* v. *Salm* arose upon an assessment of real estate by county assessors in a single county, as to which the remedies available were pointed out. Here the assessment was of property in five counties, by the State Board of Equalization for 1917 and 1918, and by its successor the State Tax Commission for the two later years. Assuming that in each of the counties before the tax could be collected a judgment must be obtained in the county court in a civil suit and that in such suits the defendants, the present plaintiffs,

could set up the facts here relied upon, as in the *Keokuk Co.'s Case,* not only would those suits be many, but there would be insuperable difficulty in determining what the proper assessment against the whole road should be and in apportioning the due share to the county concerned. This difficulty would recur in each of the five counties with not improbably different results in each. It seems to us that the right of full defence in those suits, if it exists, is not an adequate remedy at law. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 38–40. *Kirby* v. *Lake Shore & Michigan Southern R. R.,* 120 U. S. 130, 134.

We have stated what the appellants relied upon. Perhaps however it should be added that after the substitution of the State Tax Commission for the Board of Equalization, a provision was made for an appeal from the Commission to the Circuit Court of the County " for the purpose of having the lawfulness of such assessment inquired into and determined " upon a record of the evidence and proceedings before it prepared by the Commission, with a further appeal to the Supreme Court. The statute provides that the remedy by appeal shall not be construed to be exclusive. Cahill, Ill. Stat. 1923, c. 120, § 10, p. 2853. How far such an appeal would be adequate upon a charge of fraud against the Commission may be doubted, and the adequacy of a remedy at law must be clear. *Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282, 285, 286.

Decree affirmed.

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TRINIDAD, INSULAR COLLECTOR OF INTERNAL REVENUE OF THE PHILIPPINE ISLANDS, *v.* SAGRADA ORDEN DE PREDICADORES DE LA PROVINCIA DEL SANTISIMO ROSARIO DE FILIPINAS.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 53. Submitted October 5, 1923.—Decided January 14, 1924.

The Income Tax Act of October 3, 1913, excepted any corporation "organized and operated exclusively for religious, charitable, . . . or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

Held, that a corporation sole, organized, in the Philippines, for those purposes, and holding all its property therefor, was not taxable on income, used exclusively for those purposes, and derived mainly from rents from its lands, interest from its money lent, and dividends on stocks of private corporations in which its funds were invested, and in small part from occasional sales of such stocks and from sales of wine and other articles, purchased and supplied for use in its churches, schools and other agencies as an incident to its work. P. 581.

42 Phil. Rep. 397. affirmed.

CERTIORARI to a judgment of the Supreme Court of the Philippines affirming a judgment for the respondent in its action to recover money paid under protest as a tax on income.

Mr. Grant T. Trent, Mr. Logan N. Rock and *Mr. F. Granville Munson* for petitioner. *Mr. Nelson T. Hartson* was also on the brief.

Mr. Gabriel La O for respondent. *Mr. Alfredo Chicote* and *Mr. José Arnaiz* were also on the brief.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action to recover money paid under protest as a tax on income. The plaintiff prevailed in the Philippine courts, both trial and appellate, 42 Phil. 397, and the case is here on certiorari, 260 U. S. 711.

The tax was levied under paragraphs G (a) and M of § II of the Act of October 3, 1913, c. 16, 38 Stat. 172, 180, requiring every corporation, not within defined exceptions, to pay an annual tax, computed at a specified rate, on its entire net income from all sources. The exceptions covered, among others, any corporation "organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual." The plaintiff insisted it was within this exception, and the Philippine courts so ruled.

The case was heard on a stipulation stating:

"That the plaintiff is a corporation sole constituted under sections 154 to 164 of Act No. 1459 of the Philippine Commission, and is organized and operated for religious, benevolent, scientific and educational purposes in these Islands and in its Missions in China, Cochinchina and Japan, and that neither its net income nor part of its rents from whatever source it may come is applied to the benefit of any particular stockholder or individual, or of any of its members, and that no part of the whole or of some of its temporal properties belong to any of its members, who have no rights to the same, even in case of dissolution of the corporation.

"That the dividends and interests or profits and expenses which appear in Exhibit 1 of the defendant as the income of the plaintiff, constitute the income derived from the investments of the capital of the plaintiff corporation, which was invested, in the year 1913, nearly in the man-

ner and form specified in Exhibit 2 of the defendant, and that the rents appearing in Exhibit 1 were derived from the properties which together with their valuations appear in Exhibit 3 of the defendant."

The second paragraph of the stipulation is rather obscure and the exhibits are in a very condensed form, but all are elucidated by the opinions below and the briefs here. They mean, when read with these aids, that the plaintiff has large properties in the Philippines, consisting of real estate, stocks in private corporations and money loaned at interest, all of which are held and used as sources from which to obtain funds or revenue for carrying on its religious, charitable and educational work; that the bulk of its income consists of rents, dividends and interest derived from these properties; that the rest of its income is relatively small and comes from alms for mass, profits from occasional sales of some of its stocks, and sums received, in excess of cost, for wine, chocolate and other articles purchased and supplied for use in its churches, missions, parsonages, schools, and other subordinate agencies. The proportions in which these several items contributed to its income for the year covered by the tax in question are shown in the margin.[1]

The defendant concedes that the plaintiff is organized and operated for religious, charitable and educational purposes and that no part of its net income inures to the benefit of any stockholder or individual, but contends that

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[1]

Rents	(*pesos*)	90,092.70
Dividends		96,465.54
Interest		54,239.19
Sale of stocks		250.80
Sale of wine		2,711.15
Sale of chocolate		3,219.21
Sale of other articles		1,249.10
Alms for mass		6,475.00
	(*pesos*)	254,702.69

it is not "operated exclusively" for those purposes, and therefore is not within the exception in the taxing act. Stated in another way, the contention is that the plaintiff is operated also for business and commercial purposes in that it uses its properties to produce income, and trades in wine, chocolate and other articles. In effect, the contention puts aside as immaterial the fact that the income from the properties is devoted exclusively to religious, charitable and educational purposes, and also the fact that the limited trading, if it can be called such, is purely incidental to the pursuit of those purposes, and is in no sense a distinct or external venture.

Whether the contention is well taken turns primarily on the meaning of the excepting clause, before quoted from the taxing act. Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes, and yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption.

Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit. This is particularly true of many charitable, scientific and educational corporations and is measurably true of some religious corporations. Making such properties productive to the end that the income may be thus used does not alter or enlarge the purposes for which the corporation is created and conducted. This is recognized in *University* v. *People,* 99 U. S. 309, 324, where this court said: "The purpose of a college or university is to give

youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes, in the fullest and clearest sense." To the same effect is *Methodist Episcopal Church, South, v. Hinton,* 92 Tenn. 188, 200. And in our opinion the excepting clause, taken according to its letter and spirit, proceeds on this view of the subject.

The plaintiff, being a corporation sole, has no stockholders. It is the legal representative of an ancient religious order the members of which have, among other vows, that of poverty. According to the Philippine law under which it is created, all of its properties are held for religious, charitable and educational purposes; and according to the facts stipulated it devotes and applies to those purposes all of the income—rents, dividends and interest—from such properties. In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit.

As respects the transactions in wine, chocolate and other articles, we think they do not amount to engaging in trade in any proper sense of the term. It is not claimed that there is any selling to the public or in competition with others. The articles are merely bought and supplied for use within the plaintiff's own organization and agencies,—some of them for strictly religious use and the others for uses which are purely incidental to the work which the plaintiff is carrying on. That the transactions yield some profit is in the circumstances a negligible factor. Financial gain is not the end to which they are directed.

Our conclusion is that the plaintiff is organized and operated exclusively for religious, charitable and educational purposes within the meaning of the excepting clause.

Judgment affirmed.

STATE OF NORTH DAKOTA *v.* STATE OF MINNESOTA.

IN EQUITY.

No. 10, Original. Instruction to the Clerk.—Opinion rendered January 21, 1924.

In an original suit between States, the practice has been to divide the costs between the parties where the matter was a governmental question in which each had a real, yet not a litigious, interest; but where the proceeding is clearly litigious, conducted on behalf and, apparently, at the expense of private individuals, the costs should be adjudged against the defeated plaintiff.

Costs taxed against plaintiff. See *ante*, p. 365.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The Clerk has asked instruction concerning the taxation of costs.

By far the greater number of suits between States have been brought for the purpose of settling boundaries.[1] In the first, *Rhode Island* v. *Massachusetts*, 4 How. 591, 639, the bill was dismissed. There was no provision as to costs in the decree and the record of fees is not available. In

[1] *Rhode Island* v. *Massachusetts*, 4 How. 591, 639; *Missouri* v. *Iowa*, 7 How. 660; *Same Case*, 10 How. 1; *Missouri* v. *Kentucky*, 11 Wall. 395; *Indiana* v. *Kentucky*, 136 U. S. 479; *Same Case*, 159 U. S. 275; *Same Case*, 163 U. S. 520, 527; *Nebraska* v. *Iowa*, 143 U. S. 359, 370; *Iowa* v. *Illinois*, 147 U. S. 1; *Same Case*, 151 U. S. 238; *Same Case*, 202 U. S. 59; *Missouri* v. *Iowa*, 160 U. S. 688, 692; *Same Case*, 165 U. S. 118; *Missouri* v. *Nebraska*, 196 U. S. 23; *Same Case*, 197 U. S. 577; *Washington* v. *Oregon*, 211 U. S. 127; *Same Case*, 214 U. S. 205; *Missouri* v. *Kansas*, 213 U. S. 78; *Maryland* v. *West Virginia*, 217 U. S. 577, 585; *North Carolina* v. *Tennessee*, 235 U. S. 1, 17; *Minnesota* v. *Wisconsin*, 252 U. S. 273; *Same Case*, 254 U S. 14; *Same Case*, 258 U. S. 149; *Arkansas* v. *Mississippi*, 256 U. S. 28, 35; *Georgia* v. *South Carolina*, 257 U. S. 516, 523; *Oklahoma* v. *Texas*, 258 U. S. 574.

Missouri v. *Kentucky,* 11 Wall. 395, the bill was dismissed with costs, from which we infer that the defeated party paid them. In the remaining thirteen the costs were equally divided.

In *Nebraska* v. *Iowa,* 143 U. S. 359, 370, Mr. Justice Brewer, speaking for the Court, said: "The costs of this suit will be divided between the two States, because the matter involved is one of those governmental questions in which each party has a real and vital, and yet not a litigious, interest." And in *Maryland* v. *West Virginia,* 217 U. S. 577, 582, Mr. Justice Day delivering the opinion of the Court, said:

"The matter involved is governmental in character, in which each party has a real and yet not a litigious interest. The object to be obtained is the settlement of a boundary line between sovereign States in the interest, not only of property rights, but also in the promotion of the peace and good order of the communities, and is one which the States have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common, so far as may be, and we therefore adopt so much of the decree proposed by the State of Maryland as makes provision for the cost of the surveys made under the order of this court."

The same rule, however, does not apply to cases in which the parties have a litigious interest. In *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana,* 108 U. S. 76, 91, the complainant States brought suits upon bonds of Louisiana assigned to them by their citizens for the purpose of avoiding the inhibition of the Eleventh Amendment. The suits were dismissed with costs adjudged against the complainants.

In *South Dakota* v. *North Carolina,* 192 U. S. 286, 321, the suit was on bonds of North Carolina donated by the original purchasers to South Dakota and there was judg-

ment for South Dakota for the amount due with costs of suit.

In *Missouri* v. *Illinois,* 200 U. S. 496, 526, which was a bill to restrain Illinois and her subordinate agency, the Chicago Sanitary District, from discharging sewage into the Mississippi and exposing the people of Missouri to danger of typhoid fever from germs in their drinking water, the bill was dismissed without prejudice but the costs were adjudged against the complainant State.

In *New York* v. *New Jersey,* 256 U. S. 296, 313, the bill sought to restrain the pollution of the harbor of New York. The bill was dismissed without prejudice, but the costs were adjudged against New York.

In *Kansas* v. *Colorado,* 206 U. S. 46, 117, the suit was brought to enjoin diversion of flowing water. Apparently the Court regarded the issue as a non-litigious one the settlement of which would be useful to both States and, following the boundary cases, divided the costs. In *Wyoming* v. *Colorado,* 259 U. S. 496; 260 U. S. 1, 3, where the issue was similar, the costs were adjudged one-third to Wyoming, one-third to Colorado, and one-third to two corporate defendants at whose expense the case had been defended by Colorado.

The present proceeding is clearly a litigious one. The persons whose lands were overflowed raised a fund to conduct the litigation. The bill of North Dakota asked for a decree of injunction with $5,000 for damages to state property and $1,000,000 for damages to residents of North Dakota with the purpose, presumably, of distributing the latter sum to injured residents, contributors to the fund. The exact agreement as to the use of the funds thus raised does not appear in the record. When the State Engineer of North Dakota, Mr. Ralph, the chief witness for the State, was cross-examined in respect to it, he refused to answer by advice of counsel for North Dakota. The natural inference is that the fund was being

used in the conduct of the litigation. We think that the circumstances put this case in the category with *New Hampshire* v. *Louisiana, Missouri* v. *Illinois,* and *New York* v. *New Jersey,* and that the costs should be taxed against North Dakota, the defeated party.

It is so ordered.

DELANEY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 354. Argued January 3, 1924.—Decided January 21, 1924.

1. A district judge is not disqualified by Jud. Code, § 120, from sitting in the Circuit Court of Appeals upon review of a conviction for conspiracy involving no question that had been considered by him in the District Court, merely because he had overruled a motion to quash the indictment made by a co-defendant of the plaintiff in error, who was not tried, and in another case, of like character but not involving the plaintiff in error, had overruled a like motion, presided at the trial and sentenced a defendant. P. 588.
2. Where District Court and Circuit Court of Appeals concurred in sustaining a verdict of conviction as founded on sufficient testimony, *held* that this Court would not reëxamine the question. P. 589.
3. On a prosecution for conspiracy, testimony of one conspirator as to what a deceased co-conspirator had told him during the progress of the conspiracy, is admissible against a third, in the sound discretion of the trial judge. P. 590.

Affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a conviction and sentence, in a prosecution for conspiracy to violate the National Prohibition Act.

Mr. David V. Cahill, with whom *Mr. Laurence M. Fine* and *Mr. Elijah N. Zoline* were on the brief, for petitioner.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mrs.*

Mabel Walker Willebrandt, Assistant Attorney General, and *Mr. Mahlon D. Kiefer* were on the brief, for the United States.

Mr. Justice McKenna delivered the opinion of the Court.

Certiorari to the Circuit Court of Appeals to review a judgment of that court affirming a conviction and judgment of petitioner upon two indictments in which he was charged, with others, with a conspiracy to violate the National Prohibition Act. The overt acts manifesting the conspiracy and accomplishing it were enumerated.

The indictments were numbered 348H and 350H. The defendants in No. 348 were Thomas A. Delaney; Joseph Ray; Joseph Dudenhoefer, sr.; Joseph Dudenhoefer, jr.; Joseph Dudenhoefer Company, a corporation; Joseph Guidice. The defendants in No. 350 were the same parties as above, with the addition of Walter M. Burke.

The Dudenhoefers pleaded guilty, Guidice died, and Burke was not tried. Delaney, petitioner, and Ray were alone proceeded against, the indictments being consolidated for the purpose of trial and resulting in a verdict of guilty upon which there was a judgment of imprisonment in the penitentiary for two years and a fine of $10,000 imposed.

Both defendants joined in a writ of error to the Circuit Court of Appeals, composed of Judges Baker, Evans and Page. The court affirmed the judgment without opinion.

A petition for rehearing was made by petitioner (Ray not joining), based on the ground that he was convicted upon inadmissible and uncorroborated hearsay testimony; the insufficiency of the evidence otherwise to establish his guilt, and that he was deprived of a fair trial by the attitude of the trial judge. The petition was denied.

Thereupon, a petition was filed to vacate the orders theretofore entered and to set the case for reargument.

The petition recited the fact of the indictments and the proceedings and conviction upon them, and that certain other indictments were filed charging one Arthur Birk and others with violation of the Prohibition Act, and that Birk made a motion to quash the indictment, which motion was heard, considered and denied by Evan A. Evans, one of the judges of the District Court. It was further represented that a motion was made by Walter M. Burke, a co-defendant with petitioner, to quash the indictment against him, Burke, which was also heard by Judge Evans and denied by him.

It was further represented that Birk was placed on trial before Judge Evans, found guilty and sentenced to confinement in a penitentiary and to pay a fine, and that after the proceedings thus detailed, including those against petitioner, Judge Evans sat with the other judges who had presided at the trials, and took part in their deliberations respecting the penalties to be inflicted upon petitioner and his co-defendants. That Judge Evans was also one of the judges in the imposition of penalties upon the various defendants.

It was represented that by reason of the participation of Judge Evans as thus detailed, he became and was disqualified to sit in the Circuit Court of Appeals and that the order of that court purporting to affirm the judgment of the District Court was entered without jurisdiction and was void, and that a rehearing and reconsideration of the case should have been ordered.

In support of the motion, § 120 of the Judicial Code was cited. Its provision is as follows: "That no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."

The section seems not to have attracted the attention or appreciation of petitioner until he had experimented with

other means of review and relief from the conviction adjudged against him. It may be that he did not thereby waive the section which may express a policy and solicitude in the law to keep its tribunals free from bias or prejudgment, rather than to afford a remedy to a litigant, yet it would seem that he should not be permitted to assume the competency of the tribunal to decide for him and its incompetency to decide against him. His action certainly suggests the idea that it was an afterthought with him that he was at any time in the situation from which the section was intended to relieve. And was he? It will be observed that the section precludes a judge or justice before whom a "cause or question may have been tried or heard" to "sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." These words have received exposition in *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339, 343–344. It is there said, "Its manifest purpose is to require that the Circuit Court of Appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope or effect of any ruling of his own made in the progress of the cause in the court of first instance . . . which it is the duty of the Circuit Court of Appeals to consider and pass upon." In this case there was no question before the Circuit Court of Appeals that had been considered by Judge Evans in the District Court.

The charge that Judge Evans sat with the other judges and considered with them the penalties to be imposed on the codefendants of petitioner, we do not think has justification in the record. Besides, counsel at the oral argument said he was not disposed to press it.

Petitioner attacks the judgment as not being supported by the testimony, a great deal of which is detailed. The immediate reply is that the probative sufficiency of the testimony has the support of the District Court (in which is included the verdict of the jury) and of the Circuit

Court of Appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents.

It is contended that hearsay evidence was received against petitioner, and this is erected into a charge of the deprivation of his constitutional right to be confronted with the witnesses against him. Hearsay evidence can have that effect and its admission against objection constitute error. *Diaz* v. *United States*, 223 U. S. 442, 450; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 108; *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 130. And error is asserted and in support of the assertion there is general declamation and faultfinding with the case in its entirety. The only exception, however, was to testimony given by one of the conspirators of what another one of the conspirators (the latter being dead) had told him, during the progress of the conspiracy. We think the testimony was competent and within the ruling of the cases. *American Fur Co.* v. *United States*, 2 Pet. 358. *Nudd* v. *Burrows*, 91 U. S. 426, 438; *Wiborg* v. *United States*, 163 U. S. 632. And it has been said that the extent to which evidence of that kind is admissible is much in the discretion of the trial judge. *Wiborg* v. *United States*, 163 U. S. 632, 658. We do not think that the discretion was abused in the present case.

There is nothing in the record which justifies a reversal of the case and the judgment of the Circuit Court of Appeals is

Affirmed.

BANCO MEXICANO DE COMMERCIO E INDUSTRIA ET AL. *v.* DEUTSCHE BANK; MILLER, ALIEN PROPERTY CUSTODIAN, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 361. Argued January 9, 1924.—Decided January 21, 1924.

1. A suit in equity brought under § 9 of the Trading with the Enemy Act, against the Alien Property Custodian, the Treasurer of the United States and a foreign corporation, to establish a debt of the corporation to the plaintiff, as a claim against its property seized under the act and held by the Custodian and the Treasurer, is in effect a suit against the United States, and can therefore be maintained only under the conditions laid down in the act. P. 603.
2. Where money was lent by liquidators of a Mexican bank, at New York, to a German bank, and deposited by the borrower to its general credit with a trust company in that city, and, after the outbreak of the late war, before the loan fell due, the deposit with other assets of the borrower was taken over by the Alien Property Custodian, *held*, that suit to collect the loan could not be maintained by the Mexican bank under the above statute, since the debt was not one that "arose with reference to the money or other property held." P. 599.
3. The fact that, under the law of New York, the debt, when due, might have been collected by attachment of the property, had this not been seized under the statute, did not alter the case. P. 602.
4. Legislative history of this statute, including remarks of a congressman explaining the bill, *held* not to determine its construction. P. 601.

289 Fed. 924, affirmed.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District, which, on motion, dismissed the bill in a suit to enforce a claim under the Trading with the Enemy Act.

Mr. Henry W. Taft for appellants.

In no sense, either etymologically or grammatically, does the description that a debt "arose with reference to the money or other property," convey the idea of a definite legal relation, recognized in our system of law, of the debt to the "money or other property." The words are merely those of general description. If it had been intended to connote accepted legal concepts, appropriate language could easily have been selected. In a colloquial, business, etymological and grammatical sense, there are many cases where it may with accuracy be said that a debt has been incurred with reference to certain money or property, as, for instance, where by the ordinary processes of the courts the indebtedness could be collected out of such money or property belonging to the debtor. With equal accuracy the same language might be applied to a case where the creditor expected that a debt would, in the ordinary and current course of business, be paid out of money or property which was being employed in the business in connection with which the debt was incurred, and where the creditor relied on the continuing availability of such money or property as the basis of the credit. In other words, it is reasonable to look upon "with reference to" as equivalent to "with an eye toward."

The existing if incohoate right of the Banco Mexicano to sue upon the debt of the Deutsche Bank in the courts of the State of New York, where the loan was made and was payable, was a potential or executory remedy which needed only the presence in that jurisdiction of property belonging to the Deutsche Bank, to convert it into an effective legal security; and such security was actually available. It is not a violent assumption that it was the very existence of the money and property in this country, and, therefore, the likelihood of the payment of the debt, that were the inducements for the loan and

created the credit of the Deutsche Bank on which the Banco Mexicano relied. In a very practical sense, under the foregoing circumstances, therefore, the debt was incurred with reference to the money or property of the Deutsche Bank which came into the hands of the Custodian.

The Government is practically forced into the position of claiming that debts do not arise "with reference to the money or other property" except (i) where proceeds of a sale can be traced into the property, or (ii) where a contract for the purchase or sale of specific property has been made and there can be some remedy for compelling its delivery, as in a suit for specific performance, or (iii) where there is some kind of specific lien, legal or equitable, upon the property, or (iv) where title is based on physical identity and there may be recovery of possession as, for instance, by writ of replevin. But it is obvious that if the debt referred to in sub-section (e) of § 9 is confined to such cases, an intention must be attributed to Congress to destroy existing remedies under laws of the several States, where the property could, before the act, have been reached in their courts in satisfaction of the debt upon judgment and execution. Such a purpose would be inconsistent with the liberal policy inaugurated by the general provisions of the original act as amended in 1919. 41 Stat. 35.

In the absence of some purpose clearly appearing from the language of the act itself or from its legislative history, there is a strong presumption that Congress did not intend by using such ambiguous language, not only completely to reverse the liberal policy of the earlier act, but also to deprive creditors of the remedies which they would otherwise have had for the collection of their debts in both the state and the federal courts. See *Kohn* v. *Kohn, Inc.*, 264 Fed. 253, 255; *Fischer* v. *Palmer*, 259 Fed. 355. By sub-section (f) of § 9 of the act, property in the hands of

the Custodian was to continue to be free from "lien, attachment, garnishment, trustee process, or execution," and was not to be subject to "any order or decree of any court." 41 Stat. 980. Unless sub-section (e) is interpreted in accordance with our contention, the prohibition of subsection (f) results in what is in the nature of confiscation, and that is to be avoided. If, however, the elastic language of sub-section (e) is interpreted so as to extend to the allowance of claims which could, except for the passage of the act, have been prosecuted to judgment in the courts of one of the States and have been satisfied out of the property found in such State, we avoid a violent disturbance of property rights and existing remedies, and there would be excluded from the benefit of the act only those persons having no business or residence connection with this country and possessing no specific claim to or lien upon the money or property in the hands of the Custodian.

The intention of Congress was to embrace by the provisions of subsection (e) cases other than those where there was a definite legal "interest, right, or title" in the seized property. Both the counsel for the Government and the Court of Appeals have felt the pressure of this canon of interpretation, but in attempting to meet its requirements they find themselves logically forced to maintain that a debt which "arose with reference to the money or other property" must have been a debt which was related to such money or property in such a way that it could be satisfied by pursuing a right in the nature of a right *in rem* to, or a lien upon, the seized property.

In any conceivable case where a remedy exists either in law or in equity, to proceed against and secure possession of the money or property itself, it has been provided for in the first part of sub-section (a), which permits a person "claiming any interest, right, or title in" the seized property to maintain a suit in equity for its re-

covery. How can it be reasonably said that by sub-section (e) Congress intended to limit cases where debts could be collected out of the seized property to those where under sub-section (a) such property could have been resorted to?

Sub-section (e) vested in a court of equity the power to determine in each case whether a debt "arose with reference to the money or other property held by the Alien Property Custodian."

The statute should be interpreted so as to avoid the destruction of neutral rights and remedies, and a contravention of international law.

Our view of the proper interpretation of sub-section (e) is confirmed by the legislative history of the bill which became the amending Act of June 5, 1920. This history is a proper subject for the consideration of this Court.

The rule requiring the strict construction of statutes authorizing suits against the United States ought not to have been applied by the court below. The real party defendant is the Deutsche Bank. *United States* v. *Beebe*, 127 U. S. 338, 347.

Mr. Assistant to the Attorney General Seymour, with whom *Mr. Solicitor General Beck* was on the brief, for appellees.

Mr. Justice McKenna delivered the opinion of the Court.

Appeal from the decree of the Court of Appeals affirming the decree of the Supreme Court of the District of Columbia which dismissed the suit of appellants, brought in the latter court by them under the Act of Congress of October 6, 1917, entitled, "An Act To define, regulate, and punish trading with the enemy, and for other purposes," as amended June 5, 1920. 40 Stat. 411; 41 Stat. 977.

The Deutsche Bank of Berlin was duly appointed liquidator of the Banco Mexicano, a banking corporation

organized under the laws of Mexico, and authorized to act in the process of liquidation through Elias S. A. De Lima and Carlos Schulze as the representatives of the Banco Mexicano. Upon their appointment they proceeded with the liquidation of the affairs of the bank.

By virtue of their appointment and during the period they were acting as such liquidators, they were authorized to make loans of the assets of the bank for its account and to collect and, if necessary, to sue for and collect upon the claim which is the subject of this action.

They as liquidators for and on behalf of the Banco Mexicano made a loan of 500,000 gold dollars in New York City on December 15, 1916, to the Deutsche Bank of Berlin, a banking corporation existing under the laws of the German Empire, for six months with interest at the rate of 5% per annum.

The amount was paid to Hugo Schmidt, the agent of the latter bank at its place of business in the United States, and the bank agreed to repay the same in that city on June 15,.1917, with interest at the rate above mentioned.

Upon receiving that amount, represented by check, the bank forthwith deposited the same with the Guaranty Trust Company of New York to the credit of its general bank account which it then had with that institution.

On April 6, 1917, war was declared between the United States and Germany. Thereafter, as the appellants are informed and believe, under the provisions of the Trading with the Enemy Act and other statutes in such case made and provided, all moneys, securities and property owned by the Deutsche Bank in the United States or held for it by others were turned over to or seized by the Alien Property Custodian of the United States and have ever since been held by him.

It is averred, on information and belief, that the money so loaned was never transferred from the United States physically or otherwise, but constituted a part of the bal-

ance of the general deposits and securities and other property in the United States of the bank which were taken over and seized by the Alien Property Custodian. The total amount of such balance and the total value of the securities and property, are unknown to appellants but are sufficient, as they are informed and believe, after the payment and satisfaction of all other claims and demands, fully to pay, satisfy and discharge the claim and demand of the appellants arising upon the loan.

After the loan was made and until its balance, securities and other property were turned over to the Alien Property Custodian, the Deutsche Bank continuously kept in the United States sufficient funds and property over and above what was necessary to pay and discharge all other claims and demands of every kind, to repay the loan with interest, and the funds and securities were kept in the United States for the express purpose and with the intention by the use thereof of repaying the loan when it fell due. And the bank would have, in the ordinary and usual course of business, repaid the same when the debt fell due, if war had not intervened between the United States and Germany.

On June 15, 1917, there became due to appellants from the Deutsche Bank, the amount of the loan; and it is still due, although they have made demands for the payment thereof upon the bank and the Alien Property Custodian.

In pursuance of § 9 of the Trading with the Enemy Act, the appellants as liquidators and in behalf of the Banco Mexicano, on or about May 27, 1920, filed with the Alien Property Custodian a notice of claim, under oath, and in such form and containing such particulars as was required by that section and as the Custodian had prescribed, demanding payment of the debt above described, with interest thereon then accrued, by the Custodian, from the money or other property belonging to the bank, or held by him or by the Treasurer of the United States.

On or about the same day a similar application was filed with the President of the United States. Neither the President nor the Alien Property Custodian has paid the debt or the interest thereon.

Appellants aver that since December 15, 1916, the Deutsche Bank kept in the United States sufficient cash and marketable securities over and above its obligations to enable it to pay the loan and interest, and that the Alien Property Custodian and Treasurer of the United States now hold sufficient cash and securities formerly owned by the bank and seized by the Custodian over and above all claims against the same to pay the debt with interest.

Appellants are advised and believe that under the law of New York State, and in the event of default by the Deutsche Bank in the payment of the loan, they would have had, on June 15, 1917, and ever since, and now have, a cause of action against the bank upon which they could have sued and can now sue, and could have procured, and can now procure, the issue of a writ of attachment under which the funds and securities of the bank in New York City could have been, and now can be, levied upon and seized and applied in satisfaction of a judgment obtained.

It is averred that by reason of the foregoing facts the debt of the appellants arose with reference to the money and other property within the meaning and intention of subdivision (e) of § 9 of the "Trading with the Enemy Act".

A motion to dismiss the bill of appellants was made, the grounds thereof being: (1) appellants are claimants other than citizens of the United States, and that the debt which they are seeking to recover did not arise with reference to money or any other property held by the Alien Property Custodian or the Treasurer of the United States under and pursuant to the terms and provisions of the Trading with the Enemy Act, as amended.

(2) The appellants have not set forth facts sufficient to entitle them to equitable relief under § 9 of the Trading with the Enemy Act, as amended.

The motion was granted and a decree made and entered dismissing the bill.

Upon the appeal of appellants the decree was affirmed by the Court of Appeals of the District of Columbia, to review which action this appeal is prosecuted.

The case is in narrow compass. The facts are set forth in the bill; the law adduced, that is, § 9 as amended, it is contended, constitutes them grounds of recovery prayed for and demonstrates the error in the decree appealed from. We quote it although its pertinent and determining words are few. As passed October 6, 1917, it is as follows:

"That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided.*

That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, . . . to establish the interest, right, title, or debt so claimed."

The amendment of June 5, 1920, is as follows: "No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder." [§ 9(e)].

The amendment provides that: "Nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and *as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.*"

The italics are ours and mark the words which make the controversy. The Court of Appeals regarded them a limitation upon the generality of the section as originally en-

acted—an exception from its indulgence of claimants other than citizens of the United States unless the debt arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States under the act.

We concur. The condition did not exist in the claimant. The debt did not arise with reference to the money or property held. The transaction was an ordinary business one—money borrowed to be repaid at a specified distant date, a deposit of it in the ordinary way and with the legal result and relation—the creation of debtor and creditor—not a word or act else—not a word or act else giving the transaction other character or quality. No distinction, indeed, from any other transaction, nothing to give specification to it or particular remedy.

But particularity is not necessary, is the contention. Mere trace of a relation seems, in counsel's view, to satisfy the requirement of § 9. The definition of the Standard dictionary is adduced, and from it, it is said, it is reasonable to look upon "with reference to" as equivalent to "with an eye toward." To give this pertinence, necessarily, the eye must see what the statute requires to be seen—a debt that had fixed some right or title or equity to the money or other property held by the Alien Property Custodian or by the Treasurer of the United States.

In support of counsel's view, the explanation of the amendment by the congressman in charge of it is quoted as giving a remedy to a just "debt owed to a citizen of a friendly nation, that originated with reference to the property which is over here." And further "there would seem to be no reason in justice or good morals why that property here should not pay it subject to the limitation that it must have been a debt that accrued prior to the enactment of the Trading with the Enemy Act." This is given emphasis of meaning by the contrast of claims of "enemy

creditors" which it was declared "should be collected by other means than out of this property here." The views of the Attorney General were also referred to and the absence of any recommendation by the Committee on Interstate and Foreign Commerce of an intention "to make radical changes in the rights and remedies of friendly aliens as they had been created by the act previously in force."

It may be conceded that there is some suggestive strength in this history, but it is to be remembered that an act of legislation is not the act of one legislator, and its meaning and purpose must be expressed in words. If there be ambiguity in them it is the office of construction to resolve it. This we think the Court of Appeals exercised, and to a right conclusion.

A contention, or rather the support of the main contention, is made by appellants by reference to the New York statutory law which authorized, it is said, an action against a foreign corporation—in this case by the Banco Mexicano against the Deutsche Bank—for the collection of its note, a writ of attachment and a judgment that could be satisfied out of the property attached. And the further contention is that by § 9, as amended, "non-resident alien individuals and corporations were accorded broader rights even than they then enjoyed under the laws of New York, in that they could collect their indebtedness out of the property of non-resident alien enemies in the hands of the Custodian, wherever and however it arose, and whatever its nature." But this is a conclusion deduced from the construction put upon § 9 which we think is untenable.

We repeat, we do not think that the debt arose with reference to the money or other property held by the Alien Property Custodian.

Therefore, the prayer of the bill of complaint should be denied. We are constrained to this because we agree with

the Court of Appeals that this suit is in effect a suit against the United States and all of its conditions must obtain.

Decree affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of the case.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, NATIONAL COUNCIL OF TRAVELING SALESMEN'S ASSOCIATIONS, ET AL. *v.* NEW YORK CENTRAL RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 469. Argued January 9, 10, 1924.—Decided January 21, 1924.

1. Under the Act of August 18, 1922, amending § 22 of the Interstate Commerce Act, the rates for interchangeable mileage coupon tickets must be just and reasonable. P. 609.
2. Where the Commission's conclusion that a reduced rate fixed by it for such tickets was just and reasonable was contradicted by its findings of fact and was obviously based on a misconception of the amendment as requiring a reduction, *held*, that the conclusion was one of law and not binding on the court. *Id.*

288 Fed. 951, affirmed.

APPEAL from a decree of the District Court which enjoined enforcement of an order of the Interstate Commerce Commission requiring the appellee railroads to issue scrip coupon tickets at reduced rates.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Attorney General Daugherty* was on the brief, for the United States.

Laying hold of the following language of the Commission, "The spirit and the apparent theory of the law is

that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel and thereby increase net revenue . . . ," the District Court held "it is clear" the Commission proceeded on the assumption "that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates . . . ." Apparently because of those words in the report, and that only, the order was annulled.

For a case of such great public importance, this would seem a narrow and technical view on which to overthrow the order. The District Court assumed that the Commission ignored its own order of August 23, 1922, fixing a hearing on the question, *inter alia,* "What rate or rates shall be established as just and reasonable for each or either form of ticket?"; that the Commission shut its eyes to the voluminous testimony and exhibits before it; that the language of the Commission, "In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established at least for an experimental period," and "we further find that the rates resulting from the reduction will be just and reasonable for this class of travel," does not mean what it says.

There is no charge in the petition that the order is without substantial evidence to support it. The adequacy of the hearing before the Commission is not questioned.

The history of the times under which Congress acted must be considered. Reference to committee reports and debates of senators and representatives is permissible. *Stafford* v. *Wallace,* 258 U. S. 495; *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290; *Standard Oil Co.* v. *United States,* 221 U. S. 1. See also *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Chicago Board of Trade* v. *United States,* 246 U. S. 231. [Counsel then referred at

length to proceedings in the House and Senate; also to the report of the Commission in this case, and to its earlier reports on mileage and commutation tickets.]

Charges similar to those here made have already been exploded in the *New England Divisions Case,* 261 U. S. 184.

The arguments that the reduced rate is unreasonable appear to rest on the insecure foundation that, because the Commission granted increased rates in former years, which it found just and reasonable, any reduced rates, in whatever form, must necessarily be unreasonable, confiscatory, and void.

It is a new theory that the power of Congress and the Commission is limited to rate regulation in the sense that the rate must be made final in the outset. From the beginning a rate fixed by the Commission or otherwise has been expressly made subject to recovery after payment by the shipper when shown to be excessive. Reparation in large sums has frequently been awarded by the Commission and recovered through the courts.

The amendment should be construed in the light of Title IV of the Transportation Act.

The reasonableness of a rate when based on substantial evidence is a question of fact. Nor will the Court consider the weight of the evidence or the wisdom of the order.

The Commission had the right to look to "the spirit and apparent theory of the law," and the District Court erred in holding that it rested its order on that alone. *Atlantic Coast Line R. R.* v. *Burnette,* 239 U. S. 199; *Williams* v. *United States Fidelity Co.,* 236 U. S. 549; *United States* v. *Farenholt,* 206 U. S. 226; *McDougal* v. *McKay,* 237 U. S. 372; *Porto Rico Ry. Co.* v. *Mor,* 253 U. S. 345; *Eastern Extension Tel. Co.* v. *United States,* 231 U. S. 326; *Interstate Drainage* v. *Board Commissioners,* 158 Fed. 270.

The act of Congress and the order of the Commission create no new principle unfamiliar to either carriers passengers in transportation. *Commutation Rate Case,* 27 I. C. C. 549; *Interstate Commerce Comm.* v. *Baltimore & Ohio R. R. Co.,* 145 U. S. 263; *Lake Shore & Michigan Southern Ry. Co.* v. *Smith,* 173 U. S. 684; *Pennsylvania R. R. Co.* v. *Towers,* 245 U. S. 6; *Intermountain Rate Cases,* 234 U. S. 476, 485, 494.

The temporary nature of the order, in that it may undergo a revision after a one-year test, is in favor of the carriers rather than against them. *New England Divisions Case,* 261 U. S. 184, 201.

The order should be made effective, that the companies may try out the rates and report results to the Commission, thus to establish the facts upon which the rights of the parties shall ultimately depend. *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1; *Willcox v. Consolidated Gas Co.,* 212 U. S. 19; *Northern Pacific Ry. Co.* v. *North Dakota,* 216 U. S. 579; *Missouri Rate Cases,* 230 U. S. 474; *In re Louisville,* 231 U. S. 639; *Minnesota Rate Cases,* 230 U. S. 352; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153; *Stanislaus County* v. *San Joaquin Co.,* 192 U. S. 201.

The exemption of certain carriers is not arbitrary. *Wilson* v. *New,* 243 U. S. 332; *Stafford* v. *Wallace,* 258 U. S. 495.

The order does not apply to and include transportation of passengers wholly within one State.

Mr. P. J. Farrell for the Interstate Commerce Commission.

The Commission is not, as a matter of law, required to report the minor facts upon which its conclusions of fact are based. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 489.

The order does not require appellees to perform services for a noncompensatory rate, or to establish and main-

tain a rate which will be unreasonable, unjustly discriminatory, or unduly preferential and prejudicial.

The order is not in conflict with the duty imposed upon the Commission by § 15a of the Interstate Commerce Act.

The Commission, clearly, would not have made the order if it had not been convinced that compliance with its terms would increase the passenger business of the appellees and other carriers to an extent sufficient to more than offset any loss in revenue which would otherwise result from a reduction in the rate of fare.

Where the evidence is such as to justify differences in opinion, the Court will not substitute its judgment for the judgment of the Commission as to an administrative matter within the Commission's jurisdiction. It will refrain from interfering until after opportunity has been afforded for a proper test. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

The order is not invalid because it requires carriers to establish between themselves, without their consent, the relation of principal and agent and creditor and debtor. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186.

The order is not rendered invalid because the interchangeable scrip coupon ticket provided for applies to transportation regardless of the extent to which the ticket may be used on a particular line.

The fact that certain carriers are exempted from the operation of the order does not render the order invalid. *Interstate Commerce Comm.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88.

The order does not apply to the transportation of passengers wholly within one State. The Court will not presume that the Commission intended to make the order apply to matters not within its jurisdiction. *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204.

Mr. Chas. F. Choate, Jr., with whom *Mr. Francis I. Gowen, Mr. Clyde Brown, Mr. Edward G. Buckland, Mr. H. A. Taylor, Mr. Henry Wolf Biklé, Mr. Parker McCollester, Mr. Frederick H. Nash* and *Mr. James Garfield* were on the brief, for appellees.

Mr. Hoke Smith, with whom *Mr. Samuel Blumberg, Mr. Arthur M. Loeb, Mr. Jerome Wilzin* and *Mr. Charles Fischer* were on the brief, for National Council of Traveling Salesmen's Associations, appellant.

Mr. Leon B. Lamfrom, by leave of Court, filed a brief as *amicus curiae*.

Mr. Clifford Thorne and *Mr. James W. Good*, by leave of Court, filed a brief as *amici curiae*.

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought by railroad companies to prevent the enforcement of an order of the Interstate Commerce Commission dated March 6, 1923, following reports of January 26 and March 6, 1923. 77 I. C. C. 200. *Ibid.* 647. The order purports to be made in pursuance of the Act of August 18, 1922, c. 280; 42 Stat. 827. This act amended § 22 of the Interstate Commerce Act by adding to what became (1), two paragraphs, viz.: (2), directing the Commission to require the railroads subject to the act, with such exemptions as the Commission holds justified, to issue interchangeable mileage or scrip coupon tickets at just and reasonable rates, in such denominations as the Commission may prescribe, with regulations as to use and prescribing whether the tickets are transferable or not transferable, and, if the latter, what identification may be required, and what baggage privileges go with such tickets; (3) making it a misdemeanor for any carrier to refuse to issue or accept such tickets

as required, or to conform to the Commission's rules, or for any person wilfully to offer for sale or carriage any such tickets contrary to such rules. After a hearing, the Commission ordered the railroads specified, being all the railroads having annual operating revenues in excess of $1,000,000 and known as Class 1, to issue, at designated offices, a non-transferable, interchangeable, scrip coupon ticket in the denomination of $90, which shall be sold at a reduction of 20 per cent. from the face value of the ticket.

The bill alleges that the amendment of 1922, as construed by the Commission, is contrary to the Fifth Amendment and to the commerce clause, Art. I, § 8, of the Constitution, but that, properly construed, it does not authorize the order made. The order is alleged to apply to intrastate carriage, and also to be inconsistent with § 2 of the Interstate Commerce Act, which requires like charges for like service in similar circumstances; with § 3, forbidding unreasonable preferences; with § 15a, providing for the establishing of rates for rate groups that will earn a fair return upon the aggregate value of the property used in transportation; (see *Increased Rates, 1920,* cited as *Ex parte 74,* 58 I. C. C. 220; *Reduced Rates, 1922,* 68 I. C. C. 676;) and with §§ 1 and 22, requiring the Commission to establish just and reasonable fares. These averments are developed in detail, but we do not dwell upon them, because the decision below, and our own, turn upon a different point. It is further alleged in the bill that the conclusion stated by the Commission, that the reduced rates established by it for scrip coupon tickets will be just and reasonable for that class of travel, is contrary to the specific facts found by the Commission, and is not to be taken as an independent finding of fact, but only as a conclusion or ruling reached by it upon a misinterpretation of the law. This was the view taken by the three judges who sat in the District Court. They

held that the Commission considered that the amendment of 1922 either required it to make a reduction, or at least showed a spirit and purpose that should be deferred to, and on that ground came to a result that otherwise would not have been reached. They held that, therefore, the order could not stand, considering that the amendment of 1922 like the rest of the Interstate Commerce Act called for an unbiassed opinion upon the merits of the case. They issued a perpetual injunction, and the defendants appealed. 288 Fed. 951.

We are of opinion that the interpretation of the statute in the Court below was right. There is no doubt that the bill owed its origin to a movement on the part of travelling salesmen and others to obtain interchangeable mileage or scrip coupon books at reduced rates. The bill that was passed originally fixed reduced rates, but it was amended to its present form undoubtedly because the prevailing opinion was that the rates should be determined in the usual way by the usual body. The object of the travelling salesmen was defeated in so far as Congress declined to take any step beyond authorizing the issue of scrip tickets. Coming as it did from the agitation for this form of reduced fares, the statute naturally enough carried with it more or less mirage of fulfilling the hope that gave it rise, but in fact it required a determination of what was just and reasonable exactly as in any other case arising under the Interstate Commerce Act. The original purpose of the amendment as introduced retained headway enough to require the issue of scrip, but there the purpose was stopped, and, as not infrequently happens in legislation, the matter was left otherwise where it was before. Apart from constitutional difficulties, *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173 U. S. 684, the whole tendency of the law has been adverse to the enactment as proposed, at least unless a clear case should be made out.

The Commission in its report pointed out that the net railway operating income for the seven months ending July 31, 1922, was below the return fixed as reasonable, discarded the supposed analogy between the carload rate and the interchangeable scrip or mileage ticket, intimated that the supposed benefit that the carrier might get from the advance use of the money would be more than offset by the increased expenses, and said that the question whether the scrip ticket would stimulate travel sufficiently to meet any loss that might result must remain a matter of speculation until an experiment was made. After thus excluding the grounds upon which the order could be justified the Commission held that the obvious spirit and apparent purpose of the law required that the experiment should be tried, and on these premises declared that the rates resulting from the reduction of 20 per cent. would be "just and reasonable for this class of travel." It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress. But we think that it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, and therefore that the present order cannot stand.

Decree affirmed.

UNITED STATES *v.* NEW YORK COFFEE AND SUGAR EXCHANGE, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 331. Argued November 16, 1923.—Decided January 28, 1924.

1. Sales of a commodity, upon an exchange, under contracts calling for actual delivery in the future but which in practice are cleared by the processes called "matching" and "ringing," serve useful

and legitimate purposes, and are legal when not abused for illegal ends. P. 619.

2. The fact that the facilities of such an exchange, and the influence of the prices there prevailing upon sales elsewhere, may have been used by persons, not identified, in a criminal conspiracy to cause a rise of market prices, is no basis for a suit under the Anti-Trust Law to enjoin the further operation of the exchange itself and its attendant clearing house, or for a mandatory injunction to reframe their rules. P. 620.

3. Provision of rules and regulations for the conduct of such exchanges to prevent future abuse, by others, of their lawful functions, is a legislative, and not a judicial, office. P. 621.

Affirmed.

APPEAL from a decree of the District Court dismissing a suit for an injunction, under the Anti-Trust Law.

Mr. James A. Fowler, Special Assistant to the Attorney General, and *Mr. Assistant to the Attorney General Seymour,* with whom *Mr. Attorney General Daugherty, Mr. Solicitor General Beck, Mr. Roger Shale, Mr. A. F. Myers* and *Mr. David A. L'Esperance,* Special Assistants to the Attorney General, were on the briefs, for the United States.

Nothing but futures are bought and sold on the Exchange, and there are practically no deliveries made pursuant to such transactions.

The by-laws and rules controlling the Exchange and Clearing Association are designed to promote speculative transactions and to prevent deliveries of sugar through the Exchange. And when contracts made upon the Exchange are read in the light of its by-laws and rules, it is apparent that an actual delivery is rarely, if ever, contemplated.

The evidence shows that the prices of sugar in the market, both for immediate and future delivery, are controlled entirely by the prices upon the Exchange, although there may be a slight difference between the " spot " price and the price of the nearest future.

Practically all of the contracts, if not every contract, on the Exchange, are unlawful and unenforceable under the rules laid down by this Court, and recognized by all courts as the law governing such transactions. *Irwin* v. *Williar,* 110 U. S. 499; *Clews* v. *Jamieson,* 182 U. S. 461; *Pearce* v. *Rice,* 142 U. S. 28.

In a case which involves a transaction, or even a series of transactions, between certain brokers on the Exchange, as were the facts in *Clews* v. *Jamieson, supra,* it may be difficult to prove that an actual delivery was not contemplated, and the presumption that a delivery was actually intended may not be overcome; but such presumption is absolutely destroyed when it is conceded that every contract during the day on the Exchange is of such character that no delivery could have been contemplated by either party in the making of any of them.

Now, if such be the law relating to contracts upon the Exchange when all of them are "hedging" transactions, *a fortiori* must the same rule apply when some of the contracts for the day are made by pure speculators, as described in the answer, and all the others are hedging contracts. The fact that an exceedingly small proportion, considerably less than 1 per cent., of the contracts are consummated by actual deliveries can not alter the situation.

The advances in prices of "spot" and raw sugar from February 1st to the date of the filing of the petition were very largely, if not entirely, the result of speculative operations on the Exchange; and were not justified, or caused, by the existing or prospective supply of, or demand for, sugar.

Counsel then discussed the functions of an exchange and its economic effect, and the views of economists; also legislation relating to exchanges.

Authorities relied upon by defendants—*Irwin* v. *Williar,* 110 U. S. 499; *Bibb* v. *Allen,* 149 U. S. 481; *Clews* v. *Jamieson,* 182 U. S. 461; *Bond* v. *Hume,* 243 U. S. 15;

Spring v. James, 137 App. Div. 110,—were distinguished upon the ground of the difference between an action between private individuals involving transactions on an exchange and an action by the Government, representing the public, attacking the general course of conduct of the exchange.

In *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236 (cf. *Board of Trade* v. *O'Dell Commission Co.,* 115 Fed. 574; *Board of Trade* v. *Donovan Commission Co.,* 121 Fed. 1012; *Board of Trade* v. *Kinsey Co.,* 130 Fed. 507,) the Court first draws a distinction between a contract to settle by paying differences at a specified time, and a contract where it is merely expected that it will be satisfied by a set-off, there being no definite understanding to that effect. But in the present case it is shown that all the contracts are made for the purpose of "hedging" or by speculators, and that all are intended to be settled by "rings" or "matching."

As supporting the Government's contentions, there were cited: *United States* v. *Standard Oil Co.,* 221 U. S. 1, 59–62; *American Column Co.* v. *United States,* 257 U. S. 377; *United States* v. *American Oil Co.,* 262 U. S. 371; *United States* v. *Patten,* 226 U. S. 525; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Addyston Co.* v. *United States,* 175 U. S. 211, 241, 242.

Mr. William Mason Smith and *Mr. John W. Davis* for appellees.

The bill set out no case for relief under the statutes invoked.

The bill was properly dismissed as lacking in equity. No facts showing a conspiracy, combination or contract to restrain trade were alleged or proved. The allegations to that effect were mere conclusions.

The Government's charge that no economic cause existed for the advance in sugar prices was disproved.

Grave results would follow a forced closing of the Exchange, and the Government's purpose would undoubtedly be defeated thereby.

The decision of this Court in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, is no precedent for the present suit.

No facts showing concerted action or collusion on the part of the defendants to enhance prices or curtail production or restrain trade are shown.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a petition filed by the United States in the District Court for the Southern District of New York against the New York Coffee and Sugar Exchange, the New York Coffee and Sugar Clearing Association, corporations of the State of New York, and their officers and directors, for an injunction against the maintenance of an alleged conspiracy in violation of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, and of its supplementary Act of August 27, 1894, c. 349, 28 Stat. 570, as amended February 12, 1913, c. 40, 37 Stat. 667. The proceeding was brought under the expediting provisions of the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended June 25, 1910, c. 428, 36 Stat. 854. The Attorney General having duly filed a certificate that the case was of general public importance, notice of a motion for an interlocutory injunction was given by the petitioner. The corporate defendants filed an answer which by stipulation was made the answer of the individual defendants. By further stipulation the cause was submitted to final hearing before three Circuit Judges upon petition and answer and the affidavits which had been presented by both sides on the motion for a preliminary injunction. The petition was dismissed, and this is an appeal under § 2, c. 544, of the Act of February 11, 1903, 32 Stat. 823.

The sugar market of the New York Coffee and Sugar Exchange was not organized until the great war in 1914, when foreign sugar exchanges ceased to function. It was intended to afford a world exchange for the purchase and sale of sugar. It continued as an exchange until this country engaged in the war, when it was closed by government direction. Upon the coming of peace, it opened again and has been in operation ever since. The dealings are chiefly in raw sugars. The contracts made are for future delivery. There are no "wash" sales, i. e., merely bets upon the market in which it is understood between the parties that neither is bound to deliver or accept delivery. But it is true that the sugar is not delivered except in a very small percentage of the contracts. The contracts are settled by offsetting purchases against sales, i. e., by "matching" as it is called, or by "ringing." This is the same general method of settlement as that which prevails in grain sales for future delivery on the Chicago Board of Trade, and is described by this Court in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 247, *et seq.* The Sugar Clearing Association, codefendant herein with the Exchange, though a separate corporation, is under the same general management as the Exchange and its function is to provide a clearing house in which such ringing settlements are made. About seventy-five per cent. of the transactions are thus cleared. Nearly all the rest are "matched" and only a tenth to a quarter of one per cent. of the contracts are settled by actual delivery under the rules of the Exchange. The prices at which raw sugar is sold elsewhere for immediate delivery, i. e., of "spot" sales, vary very much as the prices for future delivery vary on the Exchange. It is clear that the prices for futures have a direct relation to, and effect upon, the prices in "spot" sales. The prices of raw sugar that prevail in the Exchange are used as a basis for the prices of sugar in the markets of the world.

Cuba is the largest single source of raw sugar for the United States and its crop equals or exceeds the supply from all other sources, domestic or foreign. The petition charges that the Exchange and the Clearing Association are machinery for the promotion of gambling, that though its contracts for futures on their face are for actual delivery, they really are not intended or expected by either party to result in delivery, that the Exchange rules discourage delivery, that when in fact actual delivery is sought, purchases are not made on the Exchange but elsewhere, that the Exchange thus puts in the hands of gamblers the means of influencing directly the prices of sugar to be delivered and thereby of obstructing and restraining its free flow in trade between Cuba and the United States and between the States.

The occasion for the suit was a violent fluctuation in the price of sugar futures and as a consequence in the price of spot sugars, during February, March and April of 1923. The petition alleges that during this period there was no economic justification for such a sudden and excessive increase, but that, notwithstanding, raw sugar at New York, May delivery, increased $3.65 to $4.07 per cwt. between February 1st and February 8th, and thereafter gradually increased from day to day until April 16th, when the peak of $5.97 per cwt. was reached. The effect upon refined sugar used by the consuming public was to increase its price for immediate delivery in New York from $6.70 per cwt. in February to $9.30 per cwt. in March and April.

The petition charges that all this was "the direct result of a combination and conspiracy between the New York Coffee and Sugar Exchange (Inc.), the New York Coffee and Sugar Clearing Association (Inc.), and the officers and members of those corporations and their clients or principals, who, by means of purported purchases and

sales of sugar, have sought to establish and have established artificial and unwarranted prices, not governed by the law of supply and demand, but based wholly on speculative dealings not involving the delivery of the quantities of sugar represented thereby, but altogether carried on for the purpose and with the effect of unduly enhancing the price of sugar to the enrichment of said defendants and their principals and to the detriment of the public."

The prayer is that the court adjudge that the by-laws, rules and regulations of the defendant corporations, in so far as they relate to sugar, and the concerted action of the individual defendants in carrying them out, show a combination and conspiracy in violation of federal anti-trust laws, and that the defendants and each of them be enjoined from maintaining and operating the Sugar Exchange and Clearing House, from publishing the prices of raw or refined sugar in Exchange transactions as purporting to be its market price, from attempting to establish it as such in *bona fide* dealing in actual sugar, and " from entering into or permitting to be entered into any transactions on said Exchange or elsewhere involving or purporting to involve the purchase, sale, and delivery of sugar, unless the person purporting to make such sale has in his possession or under his control a supply of sugar adequate to meet the requirements of such transaction, and the person purchasing or purporting to purchase shall in good faith intend to buy and pay for such sugar and accept delivery as soon as same can be made."

The answer of the corporate defendants denied all charges of combination and conspiracy to increase prices or to obstruct or restrain the free flow of commerce in sugar, gave the history of the organization of the two corporations, and alleged that they served a very useful purpose in stabilizing the price of sugar by furnishing a free market for this country and the world.

The evidence shows that the rules and organization of the Exchange and Clearing Association are very like those of the Chicago Board of Trade and similar Exchanges for the sales of commodities for future delivery. It is true that spot sales are not encouraged and that less actual deliveries take place in this Exchange than in some of the Exchanges for sales of other commodities, but actual deliveries are provided for in every contract and may be lawfully enforced by either party.

The usefulness and legality of sales for future delivery, and of furnishing an Exchange where under well-defined limitations and rules the business can be carried on, have been fully recognized by this Court in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 246. Those who have studied the economic effect of such Exchanges for contracts for future deliveries generally agree that they stabilize prices in the long run instead of promoting their fluctuation. Those who deal in "futures" are divided into three classes: first, those who use them to hedge, i. e., to insure themselves against loss by unfavorable changes in price at the time of actual delivery of what they have to sell or buy in their business; second, legitimate capitalists who, exercising their judgment as to the conditions, purchase or sell for future delivery with a view to profit based on the law of supply and demand; and, third, gamblers or irresponsible speculators who buy or sell as upon the turn of a card. The machinery of such an Exchange has been at times made the means of promoting corners in the commodity dealt in by such manipulators and speculators, thereby restraining and obstructing foreign and interstate trade. In such instances, the manipulators subject themselves to prosecution and indictment under the Anti-Trust Act. *United States* v. *Patten*, 226 U. S. 525. But this is not to hold that such an Exchange with the facilities it affords for making contracts for future deliveries is itself a combina-

tion and conspiracy thus to restrain interstate and foreign trade.

There is not the slightest evidence adduced to show that the two corporate defendants or any of their officers or members entered into a combination or conspiracy to raise the price of sugar. The circumstances upon which the Government placed its case were a violent rise in the price of sugar without any economic justification or explanation, lasting two months or more and manifesting itself first in "futures" on the Exchange and afterwards in the price of refined sugar for immediate delivery. The defendants suggest that this was due to a popular misconstruction of the regular monthly report of the Department of Commerce as to a probable shortage in the supply of sugar during the year 1923, followed by a statement from a business house in Cuba, usually regarded as a reliable source of information, that the previous estimate of the amount of the next Cuban crop was too high by several hundred thousand tons. Whether these circumstances were sufficient to explain in full the violent rise in the price of sugar, we need not discuss. The Government case fails because there is no evidence to establish that the defendants produced or attempted to produce the disturbance of the market.

The mere fact that the defendants were operating the Sugar Exchange and Clearing Association, even if we concede that some persons, not identified, combining and conspiring with criminal intent, used the Exchange and Clearing Association to cause the rise in sugar prices,—concessions which there is no testimony to support,—furnishes no reason for enjoining defendants from continuing the Exchange or for a mandatory injunction to reframe the rules of the Exchange and the Clearing Association.

The Government contends that the prayer of the petition is justified by the decision of this Court in the case of *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. It has

no application. We held there that Congress, having found that the sales of grain for future delivery on the Board of Trade were susceptible to speculation, manipulation and control affecting interstate consignments of grain, in such a way as to cause a direct burden on, and interference with, interstate commerce therein, had power to place such markets under federal supervision to prevent such abuses. But nothing in the case sustains the view that those promoting and operating such an Exchange are themselves imposing a burden or restraint upon interstate commerce for which they may be indicted under the Anti-Trust Act, or from continuing which they may be enjoined. The Government in effect asks this Court to enforce rules and regulations for the conduct of the Sugar Exchange which shall prevent the future abuse of its lawful functions. This is legislative and beyond our power.

The decree of the District Court is affirmed.

ELECTRIC BOAT COMPANY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 159. Argued January 11, 14, 1924.—Decided January 28, 1924.

Where the United States, without disclosure to it of the scope of an application for patent, obtained by a contract with the applicant a license, at certain rates, to manufacture and use the devices covered by the application, and was later sued by the licensor for its use of a device procured from another, which the licensor claimed came within his application and subsequent patent, *held:* (a) That the Government was not estopped from showing, by attendant facts and circumstances, that the contract was not intended by the parties to apply to the device so used, and (b) that a judgment of the Court of Claims, so limiting the contract, upon facts found, was not erroneous as a matter of law. P. 627.

7 Ct. Clms. 497, affirmed.

APPEAL from a judgment of the Court of Claims rejecting the appellant's claim, upon the facts found from the evidence.

Mr. Dean S. Edmonds and *Mr. Frederick P. Fish,* with whom *Mr. William H. Davis* was on the brief, for appellant.

A single question is presented, namely, whether or not the torpedoes constructed are within the patent, and therefore within the license and subject to the royalty payment provided for therein.

No question arises as to the validity of the Davison patent, because appellee is a licensee under the patent. *Eclipse Bicycle Co.* v. *Farrow,* 199 U. S. 581; *Harvey Steel Co.* v. *United States,* 196 U. S. 310.

The patent must be construed, particularly with respect to the claims indicated, to determine whether or not appellee's torpedo falls within it. This is a question of law to be decided by the Court. *Singer Mfg. Co.* v. *Cramer,* 192 U. S. 265.

Appellee's construction in all essential respects is identical with the construction of the Davison patent.

The only difference worthy of comment between appellee's and the patented constructions relates to the automatic regulator of the Davison patent. The characteristics attained by the use of the regulator were fully realized by Mr. Davison and were pointed out by him in his patent. But he realized also that these features were subsidiary to and refinements upon the general principle of making the feed of the fuel and water dependent upon the feed of the air so that the flow of all three of these ingredients would vary together, and that this principle could be utilized, as appellee has utilized it, by causing the air to act directly upon the fuel and water, just as well as by causing the air to act indirectly upon them through the intermediacy of a pump and a regulator, as is illustrated

in the Davison patent. This is made clear by the language of the patent.

This difference between appellee's and the Davison constructions is, therefore, a difference which has no bearing whatever upon the issues of this suit. It involves nothing more than the use, in the Davison construction, of an additional piece of mechanism to attain certain definite and additional advantages which are not attained with appellee's construction and to which the claims of the patent relied on in this suit are not limited.

A licensee is estopped from denying the validity of the patent covered by his license, and this is just as true when the licensee is the United States as when the licensee is an individual. *Harvey Steel Co.* v. *United States,* 196 U. S. 312.

But the principle goes further. The licensee is estopped from reading into a plain and unambiguous claim some element not actually present there, and from relying upon the prior art in support of a contention that such a construction of the claim is necessary. If a claim could be given some strained meaning and limited scope, out of all harmony with the usual and accepted meaning of the words employed and with the description of the invention contained in the specification, then the whole effect of the rule that the claim must be assumed to be valid because of the license, would be frustrated. *Eclipse Bicycle Co.* v. *Farrow,* 199 U. S. 581; *Siemens-Halske Elec. Co.* v. *Duncan Elec. Mfg. Co.,* 142 Fed. 157; *Chicago & A. Ry. Co.* v. *Pressed Steel Car Co.,* 243 Fed. 883; *National Recording Safe Co.* v. *International Safe Co.,* 158 Fed. 824; *United Printing Machinery Co.* v. *Cross Paper Feeder Co.,* 227 Fed. 600; *Leader Plow Co.* v. *Bridgewater Plow Co.,* 237 Fed. 376; *U. S. Frumentum Co.* v. *Lauhoff,* 216 Fed. 610.

So admission of the prior art on the ground that its examination is justified in order to fix the scope of the pat-

ent in suit (unless the claims of the patent are, on their face, ambiguous) is, in its practical effect, equivalent to releasing the defendant from the estoppel arising by reason of being a licensee under the patent or having assigned the patent to the plaintiff.

Refusal to examine and consider such extraneous evidence as the prior patents accompanying the findings would be particularly appropriate in this case in view of the special facts incident to the execution of the license.

In view of the simple facts and the plain language of the license agreement, the meaning of the agreement, what the parties intended to cover by it and what they actually did cover, are clear beyond the possibility of dispute. The thing which appellee was licensed to manufacture is explicitly defined, without ambiguity, at three places in the contract.

The correspondence leading up to the contract shows that a contract of just that meaning is just what the parties to the contract intended. Furthermore, that the parties understood that the Bliss torpedo was within the license covered by the contract is plainly indicated, for it was the only torpedo then in existence which had run a long range, the contract was solicited by the Department immediately after it had run the long range, the Department's attention was called to the fact that the Davison torpedo was "presumably similar to devices made by other companies," and that the Bliss torpedo was a water injection torpedo made by "proceeding along the same lines" as Davison, and, as soon as the license was in a form approved by both parties, the Department proceeded to order 50 torpedoes like the one which ran 10,000 yards on the test.

A representative of the Navy Department was informed of Davison's invention and urged him to develop it. Later, after much correspondence and negotiation, the Navy Department contracted with appellant and another

company for the manufacture of experimental torpedoes by them, and, as soon as the first of these experimental torpedoes was completed and tested, and its success in attaining a long range demonstrated, the license agreement now before the Court was negotiated and executed.

Throughout all of these proceedings, negotiations and correspondence, the Davison invention was referred to as the "Steam Generator for Automobile Torpedoes," and that was an entirely sufficient designation for it, because no such thing had been used before, and that term served adequately to differentiate from the superheater which had been in common use for years. The purpose of the license agreement was to secure to appellee the right to use the steam generator devised by Davison, regardless of any question either as to the validity of patents he might obtain or as to the scope of their claims. Appellee was not concerned with any such matters, and that is why it did not think it necessary to examine the Davison applications then pending in the Patent Office and in fact did not do so.

The invention was not anticipated in the prior art.

Mr. Harry E. Knight, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. Assistant Attorney General Lovett* and *Mr. L. G. Miller,* Special Assistant to the Attorney General, were on the brief, for the United States.

1. Since the court below, on the basis of all the evidence, has found as a fact that the defendant has not used plaintiff's device or invention, its conclusion that the plaintiff cannot recover presents no question of law the determination of which can lead to reversal.

2. The contract was for a definite physical thing—the Davison "Steam Generator for Automobile Torpedoes"—identified by and known to the Government only through a drawing or blue print. This device the Govern-

ment has not used, but instead it has used a device radically different in construction and operation, which device was made by the Bliss Company for the Government before the contract in question was made or was even suggested. *Harvey Steel Co.* v. *United States,* 196 U. S. 310; 38 Ct. Clms. 662; 39 Ct. Clms. 297.

3. The contract, in referring to a device covered by a patent application then pending in the Patent Office and not fixed in the form of a patent, and more especially since the content and tenor of the application was not considered by the parties, can be held at the most only to relate to what the parties could reasonably have expected to be patented; that is, to the actual novelty in the disclosure of that patent application, irrespective of the form of the claims which the Patent Office subsequently permitted in the patent document. *Eclipse Bicycle Co.* v. *Farrow,* 199 U. S. 581. In the present instance the Government utilizes devices not novel with plaintiff's assignor, Davison, but actual embodiments of inventions of the prior art which existed not only in the form of printed publications before the date of his invention, but which actually existed in the form of a completed torpedo built by the Bliss Company and successfully tested under Government supervision long before the contract was signed and even before negotiations leading to the contract were begun.

4. The patent in suit can not include and cover what was known to the public through a printed publication before the data of the patentee's invention and which the Government uses; and in fact it does not in its terms cover this.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit upon a contract made between the claimant and the United States on April 2, 1912. The contract,

headed "Shop License," recites that the claimant is "owner of the invention known as Steam Generator for Automobile Torpedoes covered by applications," of which it is necessary to mention only one, dated March 29, 1909; licenses the United States to manufacture and use torpedoes equipped with Steam Generators covered by the application to the end of the term for which patent may be granted; and binds the United States to pay at certain rates for such torpedoes. The claimant alleged that the United States had used the devices covered by claims 1, 5 and 13 of letters patent issued upon the above application on August 20, 1912. The Court of Claims found that those devices had not been used by the United States, but that the mechanism actually used by it was practically identical with that of a rival, the E. W. Bliss Company, that had been successfully tested in the fall of 1911, before the date of the above contract and before the plaintiff had attempted but failed to satisfy the same tests.

When this contract was made the United States had not seen the applications, which were the claimant's secret. Both parties knew that the Government was dealing also with a rival concern, and the United States, at least, and probably the claimant, knew that the rival had satisfied the Government's tests, which the claimant had not then done. It could not be believed that the contract meant a blind acceptance of liability for whatever might be in an undisclosed document. It did not; what it aimed at was a specific device which it was given to understand had been invented. We do not argue this at length because the proposition is accepted by the claimant—"the purpose of the license agreement was to secure to appellee the right to use the steam generator devised by Davison, regardless of any question as to the validity of patents he might obtain or as to the scope of their claims." The dealings began with proposals for applying a system to existing torpedoes that would double their range, illustrated by a

drawing showing the general arrangement of the device, identifying it but not disclosing it in detail. They ended in the contract, which went further, but undoubtedly had reference to a system the general nature of which was understood.

We must take it on this record that, at the time, certain elements in the construction of self-moving torpedoes were well known. The front end contained the explosive. Behind that was a chamber of compressed air that was transmitted to an engine moving the propeller through a pipe with a valve that reduced the pressure of the condensed air to the desired point and kept it constant The moving force was enhanced by heating the air after it left the valve. This was done by passing it through a combustion chamber into which was forced alcohol or other fuel. The fuel was in a third chamber and was carried to the place of combustion by the condensed air through a second pipe from beyond the reducing valve. It was ignited when the shell was launched. More was needed to carry the torpedo the distance required to make it usable in modern warfare. It was understood that the result could be accomplished and danger to the contrivance from excessive heat avoided by the introduction of water into the combustion chamber where it would become steam. The Bliss Company had given this knowledge a practical form, and there is no warrant in the record as it comes to us for suggesting that the claimant had anything to do with the Bliss Company's success, or that the Government had any reason for thinking that it had. In deciding what the Government reasonably supposed that it was buying, these facts are important, and what may have been contained in the undisclosed application is of little or no weight. Whatever may have been the rights of the claimant as against the Bliss Company, the Government was entitled to assume that they did not extend to the above elements, separately or combined.

Manifestly, on these facts, the Government is not estopped to show that its contract applied only within narrow limits. If the facts were as it had a right to suppose them to be, the contract necessarily was so limited. The Government thought that it might be that the claimant had found a more perfect way to do what was wanted and what the Bliss Company already had done, but, on the record before us, it would be monstrous to suppose that it was undertaking to pay the claimant for the Bliss Company product. The claimant was thought by the Government to have failed in its undertaking, and therefore its device was laid aside. That device had certain peculiarities not repeated by the Bliss Company's, but the claimant relies and has to rely here upon the broad contention that the introduction of water to the combustion chamber in an effective way belongs to it, which seems unlikely in view of the previous British patent to Sodeau, in 1907, and others, and which it seems to us clearly might have been found, as by implication it was found, by the Court of Claims, not to have been the assumption or the meaning of the contract. So far as appears, the use of water by the Bliss Company owed nothing to Davison, the claimant's assignor, but very closely embodied the suggestions of Sodeau and other predecessors in the field. We cannot say as matter of law that the Court of Claims was wrong.

Decree affirmed.

WASHINGTON-SOUTHERN NAVIGATION COMPANY *v.* BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 108. Argued November 27, 28, 1923.—Decided January 28, 1924.

1. The function of rules of court is to regulate the practice of the court and facilitate the transaction of its business. P. 635.

2. A rule of court cannot enlarge or restrict jurisdiction, or abrogate or modify the substantive law. P. 635.
3. And this limitation applies to the rules prescribed by this Court for inferior tribunals in admiralty cases. *Id.*
4. Admiralty Rule 50 was intended to formulate practice already settled, and is not to be construed as empowering the District Court to stay proceedings on an original libel until the libelant shall give security to respond to a counterclaim, in a case where the original libel is *in personam* and where the cross-libelant has given security voluntarily. Pp. 632, 638.

Questions certified by the Circuit Court of Appeals.

Mr. Arthur E. Weil for Washington-Southern Navigation Company.

Mr. Thomas Raeburn White, with whom *Mr. John Cadwalader, Jr.,* was on the brief, for Baltimore & Philadelphia Steamboat Company.

Mr. Justice Brandeis delivered the opinion of the Court.

The Washington-Southern Navigation Company, the charterer of two steamers of the Baltimore & Philadelphia Steamboat Company, filed, in the Eastern District of Pennsylvania, a libel *in personam* against the owner to recover the sum of $120,000 for breach of the charter party. The usual bond for costs was given. No attachment or seizure of the property of the respondent was made or sought. The owner traversed the essential averments of the libel, and also filed a cross-libel in which it sought damages in the sum of $43,443.25. There was no attachment or seizure of person or property under the cross-libel. The essential allegations of the cross-libel were in turn denied by the charterer. Thereafter, the owner moved that the charterer be required to give security to respond in damages on the counterclaim. The

trial court ordered it to do so, provided the owner first gave security to pay the charterer's claim. 271 Fed. 540. This the owner did of his own motion and without compulsion. The charterer did not give the security ordered. Thereupon, the trial court entered a decree staying all proceedings until its order should be obeyed.

The motion and order were based on Rule 50 of the new Admiralty Rules, promulgated December 6, 1920, 254 U. S. 24 (appendix), which amends former Rule 53, 210 U. S. 562, by adding thereto the words italicised, so that it now reads:

Rule 50. "Whenever a cross-libel is filed upon any counterclaim arising out of the same *contract or* cause of action for which the original libel was filed, *and the respondent or claimant in the original suit shall have given security to respond in damages,* the respondent in the cross-libel shall give security in the usual amount and form to respond in damages *to the claims set forth* in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given *unless the court otherwise directs.*"

The charterer appealed to the Circuit Court of Appeals. That court, under § 239 of the Judicial Code, asks instruction whether this rule empowers the District Court to stay proceedings in the original suit until the original libelant shall have given security to respond to the counterclaim, in a case where the original libel was *in personam* and the original respondent (the cross-libelant) has given the security voluntarily; that is, of his own motion and without compulsion.

The owner insists that the terms of Rule 50 are so clear that there is no room for a construction different from that given to it by the District Court. But to ascertain the true meaning of the rule, the operation and effect of the construction urged must be considered. Under that given,

a libelant may be automatically barred from prosecuting his suit, merely because he is unable or unwilling to give security to satisfy the claim made in the cross-libel. For, although no security is asked of the original respondent, he may, by voluntarily giving security, effect a stay of all proceedings against himself, "unless the court, for cause shown", directs otherwise.[1] Thus construed, Rule 50 would abrogate the right to proceed in admiralty, and substitute therefor either a conditional right to prosecute the suit, provided libelant gives security to satisfy the counterclaim, or a permission to do so, provided the court, in its discretion, for cause shown, grants leave. Moreover, the circumstances under which alone this loss of the right to sue would occur are whimsical. The original libelant could proceed without giving the security, if the respondent, instead of filing a cross-libel, brought an independent cross-suit. Likewise, if the person who feels himself aggrieved, instead of exercising diligence in prosecuting his claim, exercises self-restraint, and allows the other party to the controversy to commence the hostilities, he may, without giving the security, exercise the right to prosecute his cause of action, either by a cross-libel or by an independent cross-action.[2] An intention to introduce a practice so capricious is not to be lightly imputed.

To ascertain the true meaning of the rule, it must be read, also, in the light of the established admiralty jurisdiction, of the general principles of maritime law, and of the appropriate function of rules of court. Before Rule

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[1] Compare *Compagnie Universelle, etc.* v. *Belloni*, 45 Fed. 587; *Old Dominion S. S. Co.* v. *Kufahl*, 100 Fed. 331, 332. It has been said that the burden is upon the original libelant to show why he should be relieved from giving the security. *Empresa Maritima a Vapor* v. *North & South American Steam Nav. Co.*, 16 Fed. 502, 504; *The Transit*, 210 Fed. 575.

[2] Compare *Prince Line* v. *Mayer & Lage*, 264 Fed. 856.

53 was adopted [3], the general practice in admiralty concerning the giving of security had long been settled. Every party—libelant, respondent, claimant, and intervenor—was obliged, or could be required, to give security for costs. No party could be required to give security to satisfy the claim of another. In suits *in personam*, where the mesne process was solely by simple monition in the nature of a summons to appear and answer the suit, no security, except that for costs, was ever given by the respondent. Where the process included a clause for mesne attachment of property, the respondent was not obliged to give any security except for costs; but he could, if he chose, obtain dissolution of the attachment by giving security to pay the amount of the decree against him not exceeding the value of the attached property. Where the mesne process was by warrant of arrest of the person in the nature of a capias, the respondent was, likewise, not obliged to give security for the claim; but he could, if he chose, obtain his release by giving bail to secure his appearance and/or to satisfy the decree. Where the suit was *in rem*, the claimant was under no obligation to give such security; but he could, if he chose, obtain release of the property seized by giving security for its value or for the amount required to satisfy the claims made. Thus, neither respondent, claimant nor intervenor could, as a

[3] Rule 53 was promulgated at the December Term, 1868 (originally Rule 54, 7 Wall. p. v.). This Court first promulgated rules of practice in admiralty in 1844. 3 How. pp. iii to xiv. This was done pursuant to the Act of August 23, 1842, c. 188, §6, 5 Stat. 516, 518. For the earlier legislation see Act of September 24, 1789, c. 20, § 17, 1 Stat. 73, 83; Act of September 29, 1789, c. 21, § 2, 1 Stat. 93, 94; Act of May 8, 1792, c. 36, § 2, 1 Stat. 275, 276; Act of May 19, 1828, c. 68 § 1, 4 Stat. 278. See also *The Steamer St. Lawrence*, 1 Black, 522; *Ward* v. *Chamberlain*, 2 Black, 430. For supplemental rules and amendments of rules made prior to December 6, 1920, see 210 U. S 544-566.

condition of prosecuting his claim or defence, be compelled to furnish any security other than for costs. And the libelant could never be put into a situation which obliged him to give any other security. Such was still the practice concerning the giving of security for claims prosecuted in admiralty (except as modified by Rule 53) when Rule 50 was incorporated in the revision of December 6, 1920.[4]

The construction given to Rule 50 by the District Court would, by imposing an impossible or onerous condition, deprive many litigants of the right to prosecute their claims in admiralty. Among others, it would, if applied generally, deny this right to seamen, upon whom, regardless of their means or nationality, Congress, shortly before the adoption of Rule 50, had conferred the right to prosecute their claims, in both trial and appellate courts, without giving security even for costs.[5] It would likewise deny to poor citizens of the United States the right to proceed in admiralty, which Congress had by successive acts sought to ensure, in order to relieve litigants from dependence upon the judicial discretion theretofore incident to leave

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[4] See Rules of 1844, Nos. 25, 26, 34, 3, 4, 10, 11; Conkling, Admiralty (1848), part 2, c. 4; Benedict, Admiralty (1850), c. 27. Act of March 3, 1847, c. 55, 9 Stat. 181; Act of March 2, 1867, c. 180, 14 Stat. 543; *Manro* v. *Almeida*, 10 Wheat. 473; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *Bouysson* v. *Miller*, Bee's Adm. 186; *Lane* v. *Townsend*, 1 Ware, 286; *Smith* v. *Miln*, Abbott, Adm. 373; *Louisiana Insurance Co.* v. *Nickerson*, 2 Low. 310; *Stone* v. *Murphy*, 86 Fed. 158; *Lyons Co.* v. *Deutsche Dampschiffahrts-Geselschaft Kosmos*, 243 Fed. 202.

[5] Acts of July 1, 1916, c. 209, § 1, 39 Stat. 262, 316; June 12, 1917, c. 27, 40 Stat. 105, 157; *Ex parte Abdu*, 247 U. S. 27; Act of July 1, 1918, c. 113, § 1, 40 Stat. 634, 683. See *The Memphian*, 245 Fed. 484.

Before the enactment of these statutes, it had been held in regard to all suits in admiralty between foreigners, that the court might, in its discretion, decline to take jurisdiction. *The Belgenland*, 114 U. S. 355, 361–364.

to sue *in forma pauperis*.[6] The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment. *Illinois Central R. R. Co.* v. *Adams,* 180 U. S. 28, 34; *McClellan* v. *Carland,* 217 U. S. 268, 281. Obviously, it was not the intention of this Court, in adopting the rule, to disregard the right of seamen, of poor persons or of others to prosecute suits in admiralty. The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which

[6] Act of July 20, 1892, c. 209, § 1, 27 Stat. 252; *Bradford* v. *Southern Ry. Co.,* 195 U. S. 243; Act of June 25, 1910, c. 435, 36 Stat. 866; *Kinney* v. *Plymouth Rock Squab Co.,* 236 U. S. 43. And see Act of June 27, 1922, c. 246, 42 Stat. 666. For the general requirement in admiralty concerning stipulations for costs, see *Rawson* v. *Lyon,* 15 Fed. 831. For the limitations there upon permission to sue *in forma pauperis* prior to the legislation, see *Polydore* v. *Prince,* 1 Ware, 410; *The Ship Great Britain,* Olcott, 1; *Wheatley* v. *Hotchkiss,* 1 Sprague, 225, 227; *The Schooner Caroline and Cornelia,* 2 Ben. 105; *Cole* v. *Tollison,* 40 Fed. 303. For limitations remaining after the Act of 1892, see *Donovan* v. *Salem & P. Nav. Co.,* 134 Fed. 316; *The Pere Marquette* 18, 203 Fed. 127, 133.

lower courts make for their own guidance under authority conferred.[7]

It remains to consider the purpose of Rule 50. The cross-libel, unlike the cross-bill in equity, is of recent origin. This simple device in aid of the administration of justice was not established in the English courts of admiralty until, under the name of cross-cause, it was authorized by the Admiralty Court Act of 1861, 24 and 25 Vict., c. 10, § 34. Theretofore, that court considered itself without power even to compel consolidation of independent cross-suits or to stay one to await proceedings in the other. Moreover, where the original libel was filed by a non-resident libelant, substituted service in a cross-action, by serving his proctor, was not permitted, until this was authorized by a rule of court adopted in 1859.[8] In American courts of admiralty the practice was more liberal. Set-off being of statutory origin and not expressly authorized in admiralty, was rejected here as in England.[9] But Congress conferred upon all federal courts, in 1813, the right to compel consolidation of causes. *The*

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[7] *Ward* v. *Chamberlain*, 2 Black, 430, 435–437; *Hudson* v. *Parker*, 156 U. S. 277, 284; *Venner* v. *Great Northern Ry. Co.*, 209 U. S. 24, 33-34; *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, 18. See also *Mills* v. *Bank of the United States*, 11 Wheat. 431, 439–440; *Patterson* v. *Winn*, 5 Pet. 233, 243; *The Steamer St. Lawrence*, 1 Black, 522, 530; *Life Insurance Co.* v. *Francisco*, 17 Wall. 672, 679; *The Lottawanna*, 21 Wall. 558, 579; *The Corsair*, 145 U. S. 335, 342; *Saylor* v. *Taylor*, 77 Fed. 476, 480.

[8] See *The Rougemont*, (1893) P. 275, 276–279; Williams & Bruce, Admiralty Jurisdiction and Practice (3rd ed.), 108, 370-371. Compare Coote, Admiralty Practice (1860), 28, 133. But the court did, in some cases, stay payment on the execution. Compare *The Seringapatam*, 3 W. Rob. 38, 44; *The North American*, Lush. 79.

[9] The rule of law stated by Mr. Justice Story in *Willard* v. *Dorr*, 3 Mason, 161, that recoupment is permissible, but that set-off is not, has been strictly adhered to since. See *The Two Brothers*, 4 Fed. 158; *The Frank Gilmore*, 73 Fed. 686; *Anderson* v. *Pacific Coast Co.*, 99 Fed. 109, 111; *United Transp. & Lighterage Co.*, v. *New York & Baltimore Transp. Line*, 180 Fed. 902.

North Star, 106 U. S. 17, 27. Later, our admiralty courts recognized the propriety of affording affirmative relief by a cross-libel, in analogy to the cross-bill in equity.[10] The procedure on cross-libels and their scope remained, however, unsettled.[11]

Rule 53 was doubtless suggested by § 34 of the English Admiralty Court Act.[12] By that provision, the court was authorized, in certain cases, to suspend proceedings in the original cause until security had been given to answer judgment in the "cross cause."[13] The power was in its

[10] The earliest reported case in which the right to file a cross-libel (as distinguished from a cross-action) was definitely recognized appears to be *Snow* v. *Carruth,* 1 Sprague, 324, 327 (1856). Compare *The Hudson,* Olcott, 396 (1846); *Ward* v. *Ogdensburgh,* 5 McLean, 622 (1853); *Kennedy* v. *Dodge,* 1 Ben. 311, 316 (1867).

[11] *Ward* v. *Chamberlain,* 21 How. 572, 574 (1858), declared that on the cross-libel process must be taken out and served in the usual way. See *The Ping-On* v. *Blethen,* 11 Fed. 607, 611; *The Edward H. Blake,* 92 Fed. 202, 206. *Nichols v. Tremlett,* 1 Sprague, 361, 365 (1857), held that substituted service of the cross-libel could not be made upon the proctor of an original non-resident libelant; but that the court had power to compel submission to the jurisdiction by staying proceedings on the original libel until an appearance was entered on the cross-libel. The power to order substituted service of the cross-libel on the proctor of a non-resident libelant was still considered debatable in 1894. *The Eliza Lines,* 61 Fed. 308, 322–324. See also *The Sapphire,* 18 Wall. 51, 52, 56; *The Dove,* 91 U. S. 381; *Bowker* v. *United States,* 186 U. S. 135, 140.

[12] See *Old Dominion S. S. Co.* v. *Kufahl,* 100 Fed. 331.

[13] 24 & 25 Vict., c. 10, § 34. "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause, until security has been given to answer judgment in the cross cause." The same provision was introduced in Ireland in 1867, 30 and 31 Vict., c. 114, § 72.

terms limited to cases in which the ship of the original defendant had been arrested or he had given bail. The courts held that the act does not apply where the original libel was *in personam*;[14] and that in actions *in rem*, it had, thereunder, no power to order a stay where there had been no arrest and the defendant had given bail voluntarily.[15] Rule 53 did not so limit the power to suits *in rem*. For, while process in the nature of foreign attachment in suits *in personam* fell into disuse in England, it had become the established practice in this country.[16] Neither was Rule 53 in terms limited to suits where the original libelant had made an arrest or attachment. But, although it remained in force, unmodified, for more than half a century, no reported case discloses that a stay was ordered under it, except where the original respondent had been obliged to give security in order to obtain release of the ship or of attached property.[17] Here, as in England, the purpose of the provision was declared to be to place the parties on an

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[14] *The Amazon*, 36 L. J. Adm. (N. S.) 4; *The Rougemont*, (1893) P. 275, 276-279; 1 Halsbury, Laws of England, 95, note (*s*).

[15] *The Alne Holme*, 4 Asp. 591.

[16] *Manro* v. *Almeida*, 10 Wheat. 473; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *Louisiana Insurance Co.* v. *Nickerson*, 2 Low. 310; *Rosasco* v. *Thompson*, 242 Fed. 527. Compare Williams & Bruce, Admiralty Jurisdiction & Practice (3rd ed.), 19; Roscoe, Admiralty Practice (3rd ed.), 44, note (*c*).

[17] In *Franklin Sugar-Refining Co.* v. *Funch*, 66 Fed. 342, 343, it was doubted whether Rule 53 applied where the original libel was *in personam* and no security was exacted. In the following cases *in rem*, in which the stay was ordered, the original libelant had caused the ship to be arrested. *The Toledo*, 1 Brown Adm. 445; *The George H. Parker*, 1 Flippin, 606; *Vianello* v. *The Credit Lyonnais*, 15 Fed. 637; *Empresa Maritima a Vapor* v. *North & South American Steam Nav. Co.*, 16 Fed. 502; *The Electron*, 48 Fed. 689; *The Highland Light*, 88 Fed. 296; *Old Dominion S. S. Co.* v. *Kufahl*, 100 Fed. 331; *Jacobsen* v. *Lewis Klondike Expedition Co.*, 112 Fed. 73; *The Gloria*, 267 Fed. 929; 286 Fed. 188; *The F. J. Luckenbach*, 267 Fed. 931; 286 Fed. 188. In the following cases in which the stay was ordered the suit

equality as regards security.[18] And, under it, security to satisfy the counter claim could not be exacted by means of a stay, unless the original libelant had compelled the giving of such security to satisfy his own claim.

The new phrases introduced in Rule 50 were not designed to introduce any new practice concerning cross-libels. Their purpose was to formulate the practice which had become settled. This is true of those relating to the giving of security, as it is of those concerning the character

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was *in personam*, but respondent's property was attached. *Compagnie Universelle, etc.* v. *Belloni*, 45 Fed. 587 (see 123 Fed. 332, 333); *Lochmore S. S. Co.* v. *Hagar*, 78 Fed. 642. In *Genthner* v. *Wiley*, 85 Fed. 797, the original papers disclose that no attachment was made or bond given; and that, after the order, the bill and cross-bill were dismissed by agreement. In the following cases where the original suit was *in personam*, the stay was denied in the exercise of discretion. *Franklin Sugar-Refining Co.* v. *Funch*, 66 Fed. 342; 73 Fed. 844; *Morse Ironworks & Dry Dock Co.* v. *Luckenbach*, 123 Fed. 332; *Chesbrough* v. *Boston Elevated Ry. Co.*, 250 Fed. 922; *Interstate Lighterage & Transp. Co.* v. *Newtown Creek Towing Co.*, 259 Fed. 318; *Prince Line* v. *Mayer & Lage*, 264 Fed. 856. Also in *The Transit*, 210 Fed. 575. In *The Steamer Bristol*, 4 Ben. 55, the stay was denied because the cross-action was *in rem*, the vessel was without the jurisdiction, and process was not served on the cross-respondent. In *Crowell* v. *The Theresa Wolf*, 4 Fed. 152, and *Southwestern Transp. Co.* v. *Pittsburg Coal Co.*, 42 Fed. 920, the stay was denied because the counterclaim was not a proper subject for a cross-libel. See also *The Owego*, 289 Fed. 263.

[18] *The Cameo*, Lush, 408, 409; *The Cl[illegible]ach*, L. R. 4 A. & E. 120, 122; *The Newbattle*, 10 P. D. 33, 35. See also *The Breadalbane*, L. R. 7 P. D. 186, 187 (1881); *The Helenslea*, L. R. 7 P. D. 57, 59 (1882); *The Stoomvaart Maatschappy Nederland* v. *P. & O. S. N. Co.*, L. R. 7 A. C. 795, 821 (1882); *The Alexander*, 5 Asp. 89 (1883); *The Rougemont* (1893) P. 275; *Imperial Japanese Government* v. *P. & O. S. N. Co.*, (1895) A. C. 644, 659-60; *The James Westoll* (1905) P. 47, 51. Williams & Bruce, Admiralty Jurisdiction & Practice (3rd ed), 108, 370.

In *Empresa Maritima a Vapor* v. *North & South American Steam Nav. Co.*, 16 Fed. 502, 504, Judge Addison Brown said: "The object of rule 53, I cannot doubt, was that in cases of cross-demands upon the

of the claims which may be asserted by means of a cross-libel.[19] The answer to the question of the Circuit Court of Appeals is *No.*

FIRST NATIONAL BANK IN ST. LOUIS *v.* STATE OF MISSOURI AT THE INFORMATION OF BARRETT, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 252. Argued May 7, 1923; restored to docket for reargument May 21, 1923; reargued November 21, 22, 1923.—Decided January 28, 1924.

1. National banks are subject to state laws that do not interfere with the purposes of their creation, tend to destroy or impair their efficiency as federal agencies, or conflict with the laws of the United States. P. 656.
2. National banks can exercise only the powers expressly granted by federal statutes and such incidental powers as are necessary to the conduct of the business for which they are established. *Id.*

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same subject of litigation both parties should stand upon equal terms as regards security. It was designed, where the libelants in a suit *in rem*, through the arrest of the property, exact and obtain security for their own demand, that in a cross-suit *in personam* for a counter-claim in respect to the same subject of litigation, the defendants in the former suit should likewise be entitled to security for the payment of their demands, in case the decision of the court upon the point in controversy should be in their favor. The rule was designed to correct the inequality and injustice of the process of court *in rem* being used to obtain security in favor of one party, in reference to a single subject of dispute, while it was denied to the other."

[19] Compare *Bowker* v. *United States*, 186 U. S. 135, 141; *Vianello* v. *The Credit Lyonnais*, 15 Fed. 637; *The C. B. Sanford*, 22 Fed. 863; *The Zouave*, 29 Fed. 296; *The Electron*, 48 Fed. 689; *Genthner* v. *Wiley*, 85 Fed. 797; *The Highland Light*, 88 Fed. 296; *George D. Emery Co.* v. *Tweedie Trading Co.*, 143 Fed. 144; *The Venezuela*, 173 Fed. 834; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line*, 180 Fed. 902; 185 Fed. 386; *The Alliance*, 236 Fed. 361. See also *Brooklyn & N. Y. Ferry Co.* v. *The Morrisania*, 35 Fed. 558; *The Medusa*, 47 Fed. 821.

3. Under the National Bank Law, power to establish branches is withheld. P. 657. Rev. Stats., §§ 5134, 5190, 5138.
4. The power cannot be sustained as an incidental power, under Rev. Stats., § 5136; for the mere multiplication of places where the powers of a bank may be exercised is not a necessary incident of the banking business; and, moreover, a power which the statute, by fair construction, denies, cannot exist incidentally. P. 659.
5. A state statute prohibiting branch banks is valid in application to a national bank; for it does not frustrate the purpose for which the bank was created, or interfere with the discharge of its duties to the Government, or impair its efficiency as a federal agency. *Id.*
6. The prohibition may be enforced by the State, by such form of procedure as the State may deem appropriate,—in this case by an information in the nature of *quo warranto.* P. 660.

297 Mo. 397, affirmed.

ERROR to a judgment of the Supreme Court of Missouri, ousting the plaintiff in error from operating a branch bank, in a proceeding in the nature of *quo warranto,* instituted by the State at the information of her Attorney General. For the order restoring the case to the docket for reargument, see 262 U. S. 732.

Mr. Frank H. Sullivan and *Mr. C. A. Severance,* with whom *Mr. Frank B. Kellogg, Mr. James C. Jones, Mr. Lon O. Hocker, Mr. Eugene H. Angert* and *Mr. Wm. J. Hughes* were on the brief, for plaintiff in error.[1]

I. The State is without power to bring proceedings to question compliance by a national bank with its charter.

National banks are instrumentalities of the National Government. *McCulloch* v. *Maryland,* 4 Wheat. 316; *First National Bank* v. *California,* 262 U. S. 366.

A proceeding of this kind is the prerogative of the sovereign which created the corporation. *Ames* v. *Kansas,* 111 U. S. 460; *Territory* v. *Lockwood,* 3 Wall. 236; *Mc-*

[1] The case was argued, at the first hearing, on behalf of plaintiff in error, by *Mr. Sullivan. Messrs. Jones, Hocker, Angert* and *Hughes* were also with him on the brief.

Clung v. *Silliman,* 6 Wheat. 598; *First National Bank* v. *Union Trust Co.,* 244 U. S. 427; *Van Reed* v. *People's National Bank,* 198 U. S. 554; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Terrett* v. *Taylor,* 9 Cr. 51; *California* v. *Pacific R. R. Co.,* 127 U. S. 1; *Hale* v. *Henkel,* 201 U. S. 43; *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *Bank of United States,* 9 Wheat. 738; *Farmers Bank* v. *Minnesota,* 232 U. S. 516.

The proper relations between our dual governments make it impossible that a State should possess such power. Authorities *supra; Ableman* v. *Booth,* 21 How. 518; *Tarble's Case,* 13 Wall. 405; *Tennessee* v. *Davis,* 100 U. S. 257.

The enforcement of charter limitations on national banks is denied to citizens because it is the function of the National Government. *National Bank* v. *Matthews,* 98 U. S. 621; *National Bank* v. *Whitney,* 103 U. S. 99; *Reynolds* v. *Crawfordsville Bank,* 112 U. S. 405.

Such a power cannot exist in the States without a sacrifice of the uniformity which was one of the purposes of the National Bank Act. *Easton* v. *Iowa,* 188 U. S. 220.

Congress, in conferring jurisdiction on courts of the States over actions against national banks, has reserved actions of this type to the general government, and jurisdiction thereof to the national courts. C. 58, § 55, 12 Stat. 680; c. 106, § 56, 13 Stat. 116; Jud. Code, § 24 (16); c. 80, § 300b, 18 Stat. 320; c. 290, § 4, 22 Stat. 163; c. 373, § 4, 24 Stat. 554.

State courts have denied the power here under consideration. *State* v. *Curtis,* 35 Conn. 374; *State* v. *Bowen,* 8 S. Car. 400; *Harkness* v. *Guthrie,* 27 Utah, 248, affd. 199 U. S. 148; *State* v. *Cincinnati, etc., Ry. Co.,* 47 Oh. St. 130.

II. A state statute attempting to limit or define the powers of a national bank is invalid.

It is only general legislation of the State which is binding on national banks. *National Bank* v. *Commonwealth,* 9 Wall. 353; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275;

McClellan v. *Chipman,* 164 U. S. 347; *First National Bank* v. *California,* 262 U. S. 366.

The Congress, having defined the powers of the bank, has, in so doing, by implication, excluded those not conferred, and hence occupied the entire field of legislation on that subject. *Thomas* v. *Railroad Co.,* 101 U. S. 71; *Pennsylvania R. R. Co.* v. *St. Louis, etc., R. R. Co.,* 118 U. S. 290; *Central Transp. Co.* v. *Pullman's Car Co.,* 139 U. S. 24; *First National Bank* v. *National Exchange Bank,* 92 U. S. 122.

State legislation, in definition of the powers of a national bank, necessarily conflicts with the regulations, express or implied, prescribed by Congress. *Easton* v. *Iowa,* 188 U. S. 220; *Farmers' & Mechanics' Bank* v. *Dearing,* 91 U. S. 29; *California Bank* v. *Kennedy,* 167 U. S. 362; *First National Bank* v. *California, supra.*

State statutes defining the manner in which national banks shall exercise their franchises enjoyed from the general government are invalid because the sovereignty of the State does not so far extend to them. *McCulloch* v. *Maryland, supra; Osborn* v. *Bank of United States, supra.*

Such a statute is the exercise of visitatorial power which pertains exclusively to Congress, and which Congress has, in terms, forbidden to state legislatures. *Guthrie* v. *Harkness;* 199 U. S. 148; Rev. Stats., § 5241; c. 6, § 21, 38 Stat. 272.

III. The bank, in the exercise of its corporate functions, is not limited to a single building in the city in which it does business. Banking is a natural right, not a privilege. *Bank of Augusta* v. *Earle,* 13 Pet. 517; *Bank of California* v. *San Francisco,* 142 Cal. 276; *Curtiss* v. *Leavitt,* 15 N. Y. 9.

Except as restrained by the legislature, a corporation may conduct its business at any point within the jurisdiction of the sovereign which gives it being. 2 Fletcher, Corporations, c. 21, § 806, and cases cited; *Lloyd's Trustees* v. *Lynchburg,* 113 Va. 627.

The function here in question is within the incidental powers of a national bank unless forbidden by Congress. *First National Bank* v. *National Exchange Bank,* 92 U. S. 122; *Green Bay R. R. Co.* v. *Union Steamboat Co.,* 107 U. S. 98.

Revised Statutes, § 5134, deals only with the city, town or village designated in the charter, and not with a place of business within the city, town or village. *McCormick* v. *Market Bank,* 162 Ill. 108; s. c. 165 U. S. 538.

Revised Statutes, § 5190, does not limit a national bank to a single office for the transaction of its business. *Merchants' Bank* v. *State Bank,* 10 Wall. 604; Rev. Stats., § 5136; c. 290, 22 Stat. 162; Century Dictionary, article "a" or "an"; *United States* v. *Oregon & California R. R. Co.,* 164 U. S. 526; *United States* v. *Perry,* 133 Fed. 841; *National Union* v. *Copeland,* 171 Mass. 257; *State* v. *Martin,* 60 Ark. 334; *Commonwealth* v. *Watts,* 84 Ky. 537.

IV. There has been no departmental construction which can be permitted to control the construction of the statute. *Studebaker* v. *Perry,* 184 U. S. 258; *United States* v. *Pugh,* 99 U. S. 265; *Hahn* v. *United States,* 107 U. S. 402; *Swift Co.* v. *United States,* 105 U. S. 691; *United States* v. *Graham,* 110 U. S. 219; *Merritt* v. *Cameron,* 137 U. S. 542; *United States* v. *Healey,* 160 U. S. 136; *Louisville & Nashville R. R. Co.* v. *Kentucky,* 161 U. S. 677; *Wisconsin Central R. R. Co.* v. *United States,* 164 U. S. 190.

V. There has been no binding congressional interpretation. Rev. Stats., § 5155; c. 71, 27 Stat. 33; c. 864, § 21, 31 Stat. 1444; c. 156, 26 Stat. 62; Act of April 26, 1922, c. 147, 42 Stat. 400; *Postmaster-General* v. *Early,* 12 Wheat. 136; *United States* v. *Claflin,* 97 U. S. 546; Endlich, Interpretation of Statutes, (ed. 1888), § 372.

Mr. Solicitor General Beck, with whom *Mr. George Ross Hull* and *Mr. Charles W. Collins* were on the brief, for the United States, by special leave of Court, as *amici curiae.*

The National Bank Act vests in the Comptroller of the Currency power to supervise all the operations of national banks, and specifically authorizes him to bring suit in the United States courts for the forfeiture of the charter of any national bank which violates any provision of the act and thus exceeds its corporate powers. Rev. Stats., § 5239. Revised Statutes, § 5240, as amended by the Federal Reserve Act, § 21, 38 Stat. 271, intends that the Comptroller shall have the "visitatorial" power to enforce observance of the National Bank Act.

These proceedings are an obvious attempt to exercise visitatorial powers.

The United States alone may inquire by *quo warranto* whether a national bank, in operating as such, has acted in excess of its corporate powers.

The distinction between a pretended corporation and a legal corporation which misuses its franchise is clear; for the power to restrain the abuse of a corporate privilege is essentially visitatorial, and, to subject a federal instrumentality to the visitatorial powers of a State is to subject a federal instrumentality to the rule of two masters—and this our system of government forbids. No other case has come to our attention wherein one sovereign has successfully attempted by *quo warranto* in its own courts to define the limits of a franchise granted by another. *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, distinguished. This bank is in Missouri by the paramount authority of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316.

The ancient writ of *quo warranto* was a high prerogative writ in the nature of a writ of right for the sovereign, against one who usurped or claimed any office, franchise, or liberty of the Crown, to inquire by what authority he claimed the right. 3 Black. Com., 262; High, Extraordinary Legal Remedies, 3d ed., 544. The sovereign alone might inquire who should hold a franchise, how it should be exercised, when its limits had been exceeded, or when

its exercise had been abandoned. The writ was a purely civil proceeding. In course of time it was superseded by the speedier remedy of an information in the nature of *quo warranto*. *Territory* v. *Lockwood,* 3 Wall. 236. This proceeding was criminal in character and led to judgment, not only of ouster, but of a fine for the usurpation. *Standard Oil Co.* v. *Missouri,* 224 U. S. 270. In either proceeding, however, the king was the person aggrieved, and it was upon his initiative that the actions were begun.

When our Republic was formed with a dual sovereignty, the Nation and the constituent States, each in their respective spheres, succeeded to this prerogative of the Crown. The question as to what authority may inquire into the exercise of a federal office or franchise is not entirely new in this Court. *Wallace* v. *Anderson,* 5 Wheat. 291; *Territory* v. *Lockwood,* 3 Wall. 236. And see *State* v. *Curtis,* 35 Conn. 374. The reasoning of these opinions seems clearly applicable to the case at bar and conclusive upon the question of the power of the State of Missouri. Indeed, no other authority seems required than *McCulloch* v. *Maryland.*

National banks organized under the National Bank Act are instruments designed to be used to aid the Federal Government in the administration of its powers. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275; *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *Bank of United States,* 9 Wheat. 738.

A state court cannot impede or suspend the operation of a federal instrumentality upon the ground that the act of Congress under which the instrumentality is operating is unconstitutional, or does not confer the power sought to be exercised, for it is not within the power of the State to stay the operations of the Federal Government. *Ableman* v. *Booth,* 21 How. 506; *Tarble's Case,* 13 Wall. 397. The judicial control of the agency is within the exclusive jurisdiction of the Federal Government. *Tennessee* v. *Davis,* 100 U. S. 257.

Many cases have arisen where persons held by the state authorities have been discharged by the federal courts on the ground that the act complained of was done under authority of the United States or the process of its courts, and that the state court was, therefore, without jurisdiction. *In re Neagle,* 135 U. S. 1; *United States* v. *Fullhart,* 47 Fed. 802; *Ex parte Conway,* 48 Fed. 77; *Kelly* v. *Georgia,* 68 Fed. 652; *In re Waite,* 81 Fed. 359; affd. 88 Fed. 102; *In re Lewis,* 83 Fed. 159; *In re Thomas,* 82 Fed. 304; affd. 87 Fed. 453; 173 U. S. 276; *In re Weeks,* 82 Fed. 729; *In re Comingore,* 96 Fed. 552; affd. 177 U. S. 459; *In re Fair,* 100 Fed. 149; *Anderson* v. *Elliott,* 101 Fed 609; *United States* v. *Fuellhart,* 106 Fed. 911; *In re Turner,* 119 Fed. 231; *In re Matthews,* 122 Fed. 248; *In re Laing,* 127 Fed. 213; *Ex parte Gillette,* 156 Fed. 65; *Drury* v. *Lewis,* 200 U. S. 1; *Hunter* v. *Wood,* 209 U. S. 205; *Pundt* v. *Pendleton,* 167 Fed. 997. The principle clearly applies to national banks. *McCulloch* v. *Maryland, supra.*

Congress has vested no power in the state courts, by *quo warranto* or otherwise, to control the operations of national banks. On the contrary, it has expressly forbidden it. Act of July 12, 1882, c. 290, § 4, 22 Stat. 163; Act of August 13, 1888, c. 866, § 4, 25 Stat. 436; Rev. Stats., § 5239; *Leather Manufacturers' Bank* v. *Cooper,* 120 U. S. 778; *Petri* v. *Commercial Bank,* 142 U. S. 644; *Guthrie* v. *Harkness,* 199 U. S. 148.

If the state law prescribes a penalty for the exercise of any power by a national bank which is not authorized by the laws of the United States, the national bank is not subject to such penalty. See *Farmers' & Mechanics' Bank* v. *Dearing,* 91 U. S. 29; *Haseltine* v. *Central Bank,* 183 U. S. 132; *Schuyler National Bank* v. *Gadsden,* 191 U. S. 451.

To construe this Missouri statute as vesting in the state courts the right to determine whether any business transacted by a national bank constitutes a violation of law,

would bring it in direct conflict with § 5239, Rev. Stats., which vests this power in the Comptroller of the Currency to be exercised by suit in a United States court.

There is no analogy between *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, and *McClellan* v. *Chipman,* 164 U. S. 347, and the present case. A different situation results where an act of Congress expressly authorizes a national bank to exercise a particular power when the exercise of such power is "not in contravention of state or local law." In such case the state court by *quo warranto* proceedings may assume jurisdiction for the purpose of determining whether the exercise of the power in question contravenes any laws of the State. *First National Bank* v. *Fellows,* 244 U. S. 416.

Were this a case of first impression, there might be fair ground for argument whether, under §§ 5134 and 5190, Rev. Stats., it was intended to restrict a national bank in "its usual business" to "one banking house in any one place," thereby meaning the geographical locality, whether city, town, or village, in which the national bank has been located. But this question does not now seem to be open. For over fifty years the executive department of the Government has consistently held, as a matter of administration, that the "usual business" of a banking association must be transacted in a single and well-defined banking building; and this administrative construction of the law has additional weight, not only because Congress has, by supplemental legislation, acquiesced in it by passing laws which, in exceptional instances, authorized branch banks, but also because the agitation for the right to have branch banks has been carried on for many years, and Congress has refused to authorize such branches. See 29 Ops. Atty. Gen. 81.

A branch bank, as the term is used in the National Bank Act, by the Attorney General and by the office of the Comptroller of the Currency, partakes of the nature

of a primary organization,—in practical operations, a complete substitute for a local bank in the locality which it serves. It is to many intents and purposes an additional bank under the same board of directors, closely associated with the parent bank, but operating in most matters independently.

Considering § 5190, Rev. Stats., in the light of this definition, the "banking house" is the legal domicile of the bank from which its discretionary powers are exercised and in which its policies are formulated and approved. If a national bank should attempt to establish and operate such a branch bank, such action could be treated by the Comptroller as a violation of § 5190. His remedy would be to bring suit in his own name for forfeiture of the charter. But the question remains, can a national bank transact no business whatever beyond the four walls of its office building? May it not have "service stations" for minor and routine purposes? If the answer is "No," how can it clear its checks in the clearing house? The words "the usual business", as used in this section, can not be given a strictly literal interpretation. Much of the routine business of every bank must be transacted away from the banking house. This has always been the case. The business of banking is continually in process of growth and adjustment.

This portion of § 5190, must, therefore, be construed in connection with that portion of § 5136, which provides that the board of directors may exercise all such incidental powers as shall be necessary to carry on the business of banking.

In the light of modern banking practice a narrow and literal construction of § 5190 is unworkable. The construction must be made with the practical situation in mind. *Merchants' Bank* v. *State Bank*, 10 Wall. 604.

The operations of a national banking association may be divided into two general classes: (a) Those which must

be performed by the board of directors; and (b) those which must be delegated to and performed by the officers, agents, or servants of the bank.

These powers may be again divided into those which require discretion, judgment, and banking experience, and those which are ministerial, clerical, and of routine character.

The powers performed by the board of directors may be described as discretionary powers, while those performed by officers, agents, or servants may be referred to as ministerial powers.

The responsibility for the management and control of the affairs of the bank is definitely vested in the board of directors, and the services performed by officers or agents must be performed under the direction of and by delegation of authority from the board of directors. This being true, the discretionary powers of the board can not be delegated and must, therefore, be exercised only at the banking house.

On the other hand, the actual receipts of deposits, payment or certification of checks, the actual payment of money on loans authorized by the board, and other purely ministerial acts, of necessity must be performed by officers or agents. These acts, while usually performed at the banking house, are sometimes necessarily performed by correspondents or agents elsewhere.

It reasonably follows that, if a national bank has the incidental power to perform these administrative functions through its agents or servants, acting when necessary outside of its banking house, the bank may also, if necessary, maintain an office or offices—as distinguished from a branch—at a place other than its banking house.

To accommodate distant customers the need is strongly felt in many localities for the banks to maintain an office or offices at some distance from their banking houses for the purpose of receiving deposits and cashing checks.

A new development in banking practice has thus been instituted in a number of cities by the state banks. The national banks must be allowed to compete or suffer a serious loss in business and prestige. Did Congress contemplate a policy of unreasonable restriction, which might undermine the national banking system in the large centers of population?

[Counsel fully discussed the authority of the Comptroller, citing *Studebaker* v. *Perry,* 184 U. S. 258; *Cook County Natl. Bank* v. *United States,* 107 U. S. 445; Rev. Stats. § 5239; Agricultural Credits Act, 1923, c. 252, § 209a, 42 Stat. 1467.]

The Comptroller of the Currency has the right to determine, whether a national bank is maintaining a "branch bank," as distinguished from a "branch office," and, if satisfied that the outside business office is essentially a "branch bank," he is authorized to proceed in the courts of law to require such bank to abandon its branch under the penalty of a forfeiture of its charter.

This administrative power, however, does not necessarily imply a discretionary power to permit one bank to have a branch office and to deny it to another, or to permit one locality to have branch offices and to deny them to another. If a national bank may conduct its minor and routine operations, when necessary, beyond the walls of its place of business, it may be a right which the bank has as a part of its charter and not dependent upon any discretionary permission of the Comptroller. In this connection it is significant that the question of excesses of corporate power is to be determined in a judicial proceeding instituted by the Comptroller.

In any event the Comptroller, in his duty of compelling national banks to act within their corporate powers, has supervisory discretion; and this important duty emphasizes again the point, upon which the Government mainly relies, that a State may not, in a *quo warranto* proceeding, interfere with the exercise of such discretion.

Mr. Jesse W. Barrett, Attorney General of the State of Missouri, *Mr. Robert C. Morris* and *Mr. Frederick W. Lehmann,* with whom *Mr. Harold R. Small, Mr. Merton E. Lewis, Mr. Sam B. Jeffries, Mr. William T. Jones* and *Mr. Marion C. Early* were on the brief, for defendant in error.[1]

Branch banking by a national bank in the State of Missouri is conduct which either the national or state government has authority to stop, as such conduct is in excess of any authority from the Nation, is in contravention and defiance of the state law and is destructive of the law-abiding banks of the State.

National banks exist by virtue of federal legislation and are federal agencies subject, in the first instance, to the authority of the United States and the laws under which they are created. Their powers are measured by the express terms of the federal statutes relating to them and they can rightfully exercise only such powers or those incidental thereto which are necessary to carrying on the business for which they are created. *Logan County Bank* v. *Townsend,* 139 U. S. 67, 73. Under the provisions of Rev. Stats., § 5190, the usual business transactions of each national banking association are confined to one office or banking house. Exceptions to this general rule have been provided by statutes to meet the requirements of specific cases which do not include or comprehend the instant case. Rev. Stats., § 5155; Act May 12, 1892, c. 71, 27 Stat. 33, Act Mar. 3, 1901, c. 864, § 21, 31 Stat. 1444.

National banks are also subject to the laws of a State in respect to their affairs unless such laws conflict with federal laws or interfere with the purposes of their creation and tend to impair or destroy their efficiency as federal agencies. There is no conflict between the United States

[1] The case was argued, at the first hearing, on behalf of defendant in error, by *Mr. Merrill E. Otis* and *Mr. Harold R. Small. Messrs. Barrett, Jeffries, Jones* and *Early,* and *Mr. Edward W. Foristel* were also with them on the brief.

statutes and the laws of Missouri, and as the law is administered in Missouri, national and state banks are on an equal footing, neither having an advantage over the other.

The Missouri banking law provides that no bank shall maintain within the State a branch bank or receive deposits or pay checks except in its own banking house. R. S. Mo. 1919, § 11737. The Supreme Court of Missouri has construed this statute to mean that a bank's banking business shall be conducted in one banking house only. 297 Mo. 397.

A national bank has no authority under its charter to establish a branch or coördinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization. Neither do the federal statutes permit expressly or by implication a national bank to have domestic branches. This construction of the federal statutes relating to national banking associations has been uniformly supported by the executive officers and departments charged with the administration of the law. Rev. Stats., § 5155, amended, 1913, by § 8, Federal Reserve Act; Instructions of the Comptroller of the Treasury for 1923 under the heading of "Branch Banks;" 29 Ops. Atty. Gen. 81, 97; Op. Atty. Gen., Oct. 3, 1923.

The State, when its action is not in conflict with national law, can suppress unauthorized and unlawful conduct of a national bank within the State. The present case is not within the provisions of the Judicial Code or the Revised Statutes giving original or exclusive jurisdiction to the United States courts in certain actions and proceedings concerning national banking associations. *Herrmann* v. *Edwards,* 238 U. S. 107.

The State of Missouri in the proper exercise of its police powers has the right to suppress a wholly unauthorized, and unlawful, act in the State. *Guthrie* v. *Harkness,* 199 U. S. 148.

A proceeding in the nature of *quo warranto* is the appropriate remedy and means to question and stop unau-

thorized and unlawful conduct of a national bank in the State of Missouri. *Standard Oil Co.* v. *Missouri,* 224 U. S. 270; *First National Bank* v. *Fellows,* 244 U. S. 416.

It is plain from the history of the National Bank Act that there was no purpose at any time to confer upon national banks generally the power to establish and operate branches in the cities in which they were respectively located. Where by reason of peculiar circumstances such branch banks were thought proper, express provision was made for them, as was also done in the case of foreign branches. These exceptional instances, expressly provided for, make stronger the implication against branch banks generally. If branch banks are to become a regular feature of our banking system, it should be only as a consequence of an express grant of such power and until such grant is made national banks should not be permitted to put into practical effect a system of banking prohibited by the laws of the State and the Nation.

Messrs. Herman L. Ekern, Clifford L. Hilton, Ulysses S. Lesh, Benjamin J. Gibson, Edward J. Brundage, H. H. Cluff, Milton J. Helmick, George F. Shafer, J. S. Utley, O. S. Stillman, Charles B. Griffith, Frank E. Healy, David J. Howell, E. T. England, Thomas B. McGregor, George T. Short, Buell F. Jones and *John H. Dunbar,* Attorneys General, respectively, of the States of Wisconsin, Minnesota, Indiana, Iowa, Illinois, Utah, New Mexico, North Dakota, Arkansas, Nebraska, Kansas, Connecticut, Wyoming, West Virginia, Kentucky, Oklahoma, South Dakota and Washington, by leave of Court, filed a brief as *amici curiae.*[1]

[1] By leave of Court, briefs were also filed, at the first hearing, by the Attorneys General of the States of Wisconsin, Minnesota, Indiana, Iowa, Illinois, North Dakota, Arkansas, Kansas, Connecticut, South Dakota and Washington, and by *Mr. William Rothmann;* by *Mr. John A. Garver,* on behalf of the National City Bank of New York and The Chemical National Bank of New York; and by *Mr. John Quinn, Mr. Paul Kieffer* and *Mr. Robert P. Stewart,* on behalf of The National Bank of Commerce in New York, as *amici curiae.*

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The State of Missouri brought this proceeding in the nature of *quo warranto* in the State Supreme Court against the plaintiff in error to determine its authority to establish and conduct a branch bank in the City of St. Louis. The information avers that the bank was organized under the laws of the United States and was and is engaged in a general banking business in that city at a banking house, the location of which is given; that, in contravention of its charter and of the act of Congress under which it was incorporated, it has illegally opened and is operating a branch bank for doing a general banking business in a separate building several blocks from its banking house, and proposes to open additional branch banks at various other locations, and that this is in violation of a statute of the State expressly prohibiting the establishment of branch banks. The prayer is that, upon final hearing, the bank be ousted from the privilege of operating this branch bank or any other. A demurrer to the information was interposed and the cause thereupon submitted. The contention of the State was upheld and judgment rendered in accordance with the prayer. 297 Mo. 397.

The correctness of the judgment is challenged under numerous specifications of error presenting federal questions, which, for the purposes of the case, may be considered under two heads: (1) Whether the state statute is valid as applied to national banks; and (2) Whether a proceeding to call a national bank to account for acts of the kind here alleged may be maintained by the State, and whether the form of remedy pursued is sustainable.

First. The Missouri statute (§ 11737, R. S. Mo., 1919) provides "that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house." That the facts alleged in the in-

formation bring the case within that part of the statute which prohibits the maintenance of branch banks and that the statute applies to national banks is conclusively established by the decision of the state court, and we confine ourselves to the inquiry whether, as thus applied, the statute is valid.

National banks are brought into existence under federal legislation, are instrumentalities of the Federal Government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States. *National Bank* v. *Commonwealth,* 9 Wall. 353, 362; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283. These two cases are cited and followed in the later case of *McClellan* v. *Chipman,* 164 U. S. 347, 357, and the principle which they establish is said to contain a rule and an exception, "the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." See also *Waite* v. *Dowley,* 94 U. S. 527, 533. The question is whether the Missouri statute falls within the rule or within the exception.

Does it conflict with the laws of the United States? In our opinion, it does not. The extent of the powers of national banks is to be measured by the terms of the federal statutes relating to such associations, and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established. *Bullard* v. *Bank,* 18

Wall. 589, 593; *Logan County National Bank* v. *Townsend,* 139 U. S. 67, 73; *California Bank* v. *Kennedy,* 167 U. S. 362, 366. Among other things the federal law (Rev. Stat., § 5134) provides that the organization certificate of the association shall specifically state "the place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county, city, town, or village." By another provision (Rev. Stats. § 5190) it is required that "the usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate." Strictly, the latter provision, employing, as it does, the article "an," to qualify words in the singular number, would confine the association to one office or banking house. We are asked, however, to construe it otherwise in view of the rule that "words importing the singular number may extend and be applied to several persons or things." Rev. Stats., § 1. But obviously this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute. See *Garrigus* v. *Board of Commissioners,* 39 Ind. 66, 70; *Moynahan* v. *City of New York,* 205 N. Y. 181, 186. Here there is not only nothing in the context or in the subject matter to require the construction contended for, but other provisions of the national banking laws are persuasively to the contrary. By § 5138, Rev. Stats., the minimum amount of capital is fixed in proportion to the population of the place where the bank is located. If it had been intended to allow the establishment by an association of not one bank only but, in addition, as many branch banks as it saw fit, it is remarkable, to say the least, that there should have been no provision for adjusting the capital to the latter contingency or for determining how or under what circumstances such branch banks might be established or for regulating them. Section 5155, Rev. Stats., provides that it shall be lawful for a stat

bank "having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association . . . and to retain and keep in operation its branches . . . the amount of the circulation . . . to be regulated by the amount of capital assigned to and used by each." This provision, confined by its terms, as it is, to existing state institutions, may be fairly considered as constituting an exception to the general rule, and the presence of safeguarding limitations in the excepted case, with their entire absence from the statute otherwise, goes far in the direction of confirming the conclusion that the general rule does not contemplate the establishment of branch banks. This apparently was the interpretation of Congress itself, since in two instances at least special legislation was deemed necessary to allow the establishment of branch banks, viz: at the Chicago Exposition, in 1892, c. 71, 27 Stat. 33, and at the St. Louis Exposition, in 1901, c. 864, 31 Stat. 1444, § 21, the existence of the branch bank in each instance being expressly limited to the period of two years.

The construction of the executive officers charged with the administration of the law has been, with substantial uniformity, to the same effect, and in this view the Department of Justice, in a well considered opinion, rendered May 11, 1911, concurred. Lowry National Bank—Establishment of Branches. 29 Ops. Atty. Gen. 81.[1]

This interpretation of the statute by the legislative department and by the executive officers of the government would go far to remove doubt as to its meaning if any existed. See *Tiger* v. *Western Investment Co.*, 221 U. S.

[1] Our attention is directed to a later opinion of the Attorney General, dated October 3, 1923, which, although in terms affirming the earlier opinion, announces a limited rule which does not seem to be in precise agreement with it. To the extent of the disagreement, however, we accept the view of the earlier opinion.

286, 309; *United States* v. *Hermanos y Compañia,* 209 U. S. 337, 339.

But is is said that the establishment of a branch bank is the exercise of an incidental power conferred by § 5136, Rev. Stats., by which national banking associations are vested with " all such incidental powers as shall be necessary to carry on the business of banking." The mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business, within the meaning of this provision. Moreover, the reasons adduced against the existence of the power substantively are conclusive against its existence incidentally; for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.

Clearly, the state statute, by prohibiting branches, does not frustrate the purpose for which the bank was created or interfere with the discharge of its duties to the government or impair its efficiency as a federal agency. This conclusion would seem to be self evident, but if warrant for it be needed, it sufficiently lies in the fact that national banking associations have gone on for more than half a century without branches and upon the theory of an absence of authority to establish them. If the non-existence of such branches or the absence of power to create them has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken by Congress to remedy the omission.

Second. The state statute as applied to national banks is, therefore, valid, and the corollary that it is obligatory

and enforceable necessarily results, unless some controlling reason forbids; and, since the sanction behind it is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter. To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law. It is insisted with great earnestness that the United States alone may inquire by *quo warranto* whether a national bank is acting in excess of its charter powers, and that the State is wholly without authority to do so. This contention will be conceded since it is plainly correct, but the attempt to apply it here proceeds upon a complete misconception of what the State is seeking to do, a misconception which arises from confounding the relief sought with the circumstances relied upon to justify it. The State is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. What the State is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation. The latter inquiry is preliminary and collateral, made only for the purpose of determining whether the state law is free to act in the premises or whether its operation is precluded in the particular case by paramount law. Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute. In other words, the national statutes are interrogated for the sole purpose of ascertaining whether anything they contain constitutes an impediment to the enforcement of the state statute, and the answer being in the negative, they may be laid aside as of no further concern.

The application of the state statute to the present case and the power of the State to enforce it being established, the nature of the remedy to be employed is a question for state determination; and the judgment of the state court that the one here employed was appropriate is conclusive unless it involves a denial of due process of law, which plainly it does not. We are not concerned with the question whether an information in the nature of *quo warranto,* according to the general principles of the law, is in fact appropriate. It is enough that the Supreme Court of the State has so held. *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 287; *Twining* v. *New Jersey,* 211 U. S. 78, 110–111. In *Iowa Central Ry. Co.* v. *Iowa,* 160 U. S. 389, 393, this Court said: "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. . . . Whether the court of last resort of the State of Iowa properly construed its own constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court." See also *Louisville & Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230, 236; *Hooker* v. *Los Angeles,* 188 U. S. 314, 318; *Rogers* v. *Peck,* 199 U. S. 425, 435.

The judgment of the Supreme Court of Missouri is therefore

Affirmed.

MR. JUSTICE VAN DEVANTER, dissenting.

I am constrained to dissent from the opinion and judgment just announced.

National banks are corporate instrumentalities of the United States created under its laws for public purposes essentially national in character and scope. Their powers are derived from the United States, are to be exercised under its supervision and can be neither enlarged nor restricted by state laws. The decisions uniformly have been to this effect and have proceeded on principles which were settled a century ago in the days of the Bank of the United States.

In *McCulloch* v. *Maryland*, 4 Wheat. 316, where the status of that bank was drawn in question and elaborately discussed, this Court reached the conclusion that the Constitution invests the United States with authority to provide, independently of state laws, for the creation of banking institutions, and their maintenance at suitable points within the States, as a means of carrying into execution its fiscal and other powers. Chief Justice Marshall there dealt with the respective relations of the United States and the States to such an instrumentality in a very plain and convincing way. Among the other things, he said:

(p. 424) "After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land."

(p. 427) "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its operations from their influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain."

(p. 429) " The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme."

In *Osborn* v. *Bank of the United States*, 9 Wheat. 738, there was drawn in question the validity of a state statute which, after reciting that the bank had been pursuing its operations contrary to a law of the State, provided that if the operations were continued the bank should be liable to specified exactions, called a tax. The statute was held invalid, the Court saying:

(pp. 860, 861) " The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connexion with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes . . . It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government."

The later legislation of Congress under which national banks are created and maintained stands on the same constitutional plane. When its validity has been assailed, or its operative force in a State questioned, the cases just mentioned have been regarded as settling the principles to be applied.

In *Farmers' and Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 31, the Court referred to those cases, pro-

nounced their reasoning applicable to the later legislation, and said:

(pp. 33-34) "The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. . . . Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'"

To the same effect are *Easton* v. *Iowa,* 188 U. S. 220, 230, 237; *Van Reed* v. *People's National Bank,* 198 U. S. 554, 557; *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, 425; and *First National Bank* v. *California,* 262 U. S. 366, 369. Of special pertinence are the following excerpts from *Easton* v. *Iowa:*

(p. 229) "That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States."

(pp. 231-232) "It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute.

"It is argued by the learned Attorney General on behalf of the State of Iowa that 'the effect of the statute of Iowa is to require of the officers of all banks within the State a higher degree of diligence in the discharge of their duties. It gives to the general public greater confidence in the stability and solvency of national banks, and in the honesty and integrity of their managing officers. It enables them better to accomplish the purposes and designs

of the general government, and is an aid, rather than impediment, to their utility and efficiency as agents and instrumentalities of the United States.'

"But we are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities."

It must be admitted that, in so far as the legislation of Congress does not provide otherwise, the general laws of a State have the same application to the ordinary transactions of a national bank,—such as incurring and discharging obligations to depositors, presenting drafts for acceptance or payment and giving notice of their dishonor, taking pledges for the repayment of money loaned, and receiving or making conveyances of real property,—that they have to like transactions of others. But not so of questions of corporate power. As explained in *Easton* v. *Iowa* and other cases, their solution must turn on the laws of the United States under which the bank is created.

National banks, like other corporations, have such powers as their creator confers on them, expressly or by fair implication, and none other. *Thomas* v. *West Jersey R. R. Co.*, 101 U. S. 71, 82; *Logan County National Bank* v. *Townsend*, 139 U. S. 67, 73. Powers not so conferred are in effect denied; a prohibition is implied from the failure to grant them. *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 128; *California Bank* v. *Kennedy*, 167 U. S. 362, 367. In short, all the powers of a national bank, like its right to exist at all, have their source in the laws of the United States. Only where those laws bring state laws into the problem,—as by enabling national banks to act as executors, administrators, etc., where that is permitted by state laws,—can the latter have

any bearing on the question of corporate power—the privileges which the bank may exercise. *First National Bank* v. *Union Trust Co.*, 244 U. S. 416.

The proceeding now before us is an information in the nature of *quo warranto* brought in the Supreme Court of Missouri, whereby that State challenges the power of a national bank in the City of St. Louis to conduct a branch bank established by it in that city and asks that the bank be ousted from that privilege on the grounds, first, that establishing and conducting the branch is a violation of the bank's charter powers, and, secondly, that it is prohibited by a law of the State.

It is not claimed that the laws of the United States contain any provision whereby the privilege asserted by the bank is made to depend on the will or legislative policy of the State; nor do they in fact contain any such provision. Whether the bank has the privilege which it asserts is therefore in no way dependent on or affected by the state law, but turns exclusively on the laws of the United States. If they grant the privilege, expressly or by fair implication, no law of the State can abridge it or take it away. And if they do not grant it, they in effect prohibit it, and no law of the State can strengthen or weaken the prohibition. In either event nothing can turn on the state law. It simply has no bearing on the solution of the question.

In this situation the State is not, in my opinion, entitled to maintain the proceeding. It has no distinctive right to protect, nor any applicable law to vindicate or enforce. The proceeding is one which may be maintained only in the public right. Here the State is not authorized to represent or to speak for the public. The bank is not a creation and instrumentality of the State, but of the National Government. Its presence in the State is attributable to the national power, not to the State's permission. Whether the bank shall be kept within its legitimate powers and made to discontinue any departure from or abuse

of them is a matter in which the people of all the States have the same interest, the bank being a national creation and instrumentality. The people of Missouri merely share in the common interest. "In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." *Massachusetts* v. *Mellon,* 262 U. S. 447, 486. It therefore is apparent that the State is here mistakenly appropriating to itself a function which belongs to the United States.

In *Tarble's Case,* 13 Wall. 397, 407, which possessed features making it particularly pertinent here, this Court pointed out the distinct and independent character of the national and state governments, within their respective spheres, and in that connection said:

"Neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

Another case apposite in principle is *Territory* v. *Lockwood,* 3 Wall. 236. It was a proceeding in the nature of *quo warranto* brought by the Territory of Nebraska to test the defendant's right to hold a federal office in the Territory which he was charged with unlawfully usurping. This Court disposed of the matter by saying, p. 239:

"The right of the Territory to prosecute such an information as this would carry with it the power of amotion

without the consent of the government from which the appointment was derived. This the Territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the States as to the Federal officers whose duties are to be discharged within their respective limits. The right to institute such proceedings is inherently in the Government of the nation."

With great deference, I think the judgment below should be reversed on the ground that the State is without capacity to bring or maintain this proceeding, and the court below without authority to entertain it.

THE CHIEF JUSTICE and MR. JUSTICE BUTLER authorize me to say that they concur in this dissent.

AMENDMENT, RULE 24.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

ORDER: It is ordered that Section 7 of Rule 24 of this Court be amended by striking therefrom the words "fifteen cents per folio," in the clause prescribing fees for preparing records, etc., and substituting the words "ten cents per folio," so that the entire clause will read:

"For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, ten cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be five cents per folio."

This order shall apply to causes filed here on or after December 1, 1923, but not to causes filed prior to that date.

Promulgated November 12, 1923.

ADDITION TO RULE 37.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

ORDER: It is ordered that the following be added as Section 5 to Rule 37 of this Court:

"5. Whenever application for the writ of certiorari to review a decision of any court, as provided in this rule, is granted, the clerk shall enter an order to that effect. The order shall also direct that the certified transcript of record on file here be deemed and treated as though sent up in reply to a formal writ, and that notice be given to the court or judges below and to counsel of record. No formal writ shall issue unless specially directed."

Promulgated November 12, 1923.

DECISIONS PER CURIAM, FROM OCTOBER 1, 1923, TO AND INCLUDING JANUARY 28, 1924, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 15, Original. October Term, 1922. COMMONWEALTH OF PENNSYLVANIA, *v.* STATE OF WEST VIRGINIA; and

No. 16, Original. October Term, 1922. STATE OF OHIO *v.* STATE OF WEST VIRGINIA. October 8, 1923. Petition for rehearing granted; and cases set for reargument on Monday, November 19 next, at the head of the call for that day. *Mr. Edward T. England,* Attorney General of the State of West Virginia, *Mr. Fred O. Blue, Mr. George M. Hoffheimer, Mr. Philip P. Steptoe* and *Mr. William S. John,* for defendant, in support of the petition. See *ante,* p. 350.

No. —. SHOOTERS ISLAND SHIPYARD COMPANY *v.* STANDARD SHIPBUILDING CORPORATION;

No. —. UNITED STATES *v.* STANDARD SHIPBUILDING CORPORATION; and

No. —. UNITED STATES *v.* STANDARD SHIPBUILDING CORPORATION. Motion for leave to file petition for appeals to the Circuit Court of Appeals for the Second Circuit submitted June 11, 1923. Decided October 8, 1923. Motion for leave to file petition for appeals herein denied. *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for petitioners.

No. —, Original. UNITED STATES *v.* EDWIN L. GARVIN, JUDGE, DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK. Submitted June 11, 1923. Decided October 8, 1923. Motion for leave to file petition for a writ of prohibition or mandamus herein

denied. *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for petitioner.

No. —, Original. *Ex parte:* IN THE MATTER OF EMPIRE MACHINERY & SUPPLY COMPANY ET AL., PETITIONERS. Submitted October 1, 1923. Decided October 8, 1923. Motion for leave to file petition for a writ of mandamus and/or prohibition and/or certiorari herein denied. *Mr. Jacob Louis Morewitz* for petitioners.

No. —, Original. *Ex parte:* IN THE MATTER OF THE STATE OF NEW YORK ET AL., PETITIONERS. Submitted October 1, 1923. Decided October 8, 1923. Motion for leave to file petition for a writ of prohibition, mandamus, or certiorari herein denied. *Mr. Clarence C. Fowler* for petitioners.

No. 46. TITLE GUARANTY & TRUST COMPANY ET AL., EXECUTORS, ETC. *v.* WILLIAM H. EDWARDS, COLLECTOR OF INTERNAL REVENUE, ETC. Error to the District Court of the United States for the Southern District of New York. Argued October 4, 1923. Decided October 8, 1923. Per *Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. James F. Brady* for plaintiffs in error. *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the briefs, for defendant in error.

No. 154. J. O'NEAL SANDEL, ADMINISTRATOR, ETC. *v.* STATE OF SOUTH CAROLINA. Error to the Supreme Court of the State of South Carolina. Motion to affirm sub-

mitted October 1, 1923. Decided October 8, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Louisiana Navigation Co.* v. *Oyster Commission,* 226 U. S. 99, 101; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Missouri & Kansas Interurban Ry. Co.* v. *Olathe,* 222 U. S. 185, 186. *Mr. Samuel M. Wolfe,* for defendant in error, in support of the motion. *Mr. William N. Graydon,* for plaintiff in error, in opposition to the motion.

No. 286. AETNA INSURANCE COMPANY ET AL. *v.* STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC. Error to the Supreme Court of the State of Mississippi. Motion to dismiss or affirm submitted October 1, 1923. Decided October 8, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5-6. *Mr. Earl N. Floyd,* for defendant in error, in support of the motion. *Mr. William H. Watkins, Mr. R. L. McLaurin, Mr. William Thompson, Mr. Edward L. Blodgett* and *Mr. Foye M. Murphy,* for plaintiffs in error, in opposition to the motion. [See *infra,* 678, 698.]

No. 386. INDIAN TERRITORY ILLUMINATING OIL COMPANY *v.* BARTLESVILLE ZINC COMPANY ET AL. Appeal from the Circuit Court of Appeals for the Third Circuit. Motion to dismiss submitted October 1, 1923. Decided October 8, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 568, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *St. Anthony Church* v. *Pennsylvania R. R. Co.,* 237 U. S. 575, 577, 578; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. Joseph B. Cotton,* for appellees, in support of the motion. *Mr. Watson B. Robinson, Mr. William J. Hughes*

and *Mr. Charles A. Frueauff,* for appellant, in opposition to the motion. [See *infra,* 701.]

No. 1. LUELLA SWARTWOOD, AS SOLE ADMINISTRATRIX, ETC., *v.* LEHIGH VALLEY RAILROAD COMPANY. Error to the Court of Appeals of the State of New York. Submitted October 2, 1923. Decided October 8, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. Charles C. Annabel* and *Mr. Frederick S. Tyler* for plaintiff in error. *Mr. Riley H. Heath* for defendant in error.

No. 7. AMERICAN RAILWAY EXPRESS COMPANY *v.* COMMONWEALTH OF KENTUCKY. Error to the Court of Appeals of the State of Kentucky. Submitted October 2, 1923. Decided October 8, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. Charles W. Stockton* and *Mr. Lawrence Maxwell* for plaintiff in error. *Mr. Kenneth E. Stockton* and *Mr. Hamilton Vreeland, Jr.,* were also on the brief. *Mr. Charles I. Dawson* for defendant in error.

No. 6. SCHOOL DISTRICT OF THE BOROUGH OF GREENSBURG *v.* S. T. LOPES ET AL. Error to the Supreme Court of the State of Pennsylvania. Argued October 2, 1923. Decided October 8, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253

U. S. 193, 195. *Mr. James S. Beacom* for plaintiff in error. *Mr. James S. Moorehead* and *Mr. Robert W. Smith* appeared for defendants in error.

No. 41. F. E. WEAR ET AL. *v.* VIRGIL W. JOHNSTON ET AL. Error to the Supreme Court of the State of Kansas. Argued October 4, 1923. Decided October 8, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1, 5–6. *Mr. Samuel Feller*, with whom *Mr. H. M. Langworthy* was on the briefs, for plaintiffs in error. *Mr. Douglas Hudson* appeared for defendants in error.

No. 23. MANGUM ELECTRIC COMPANY *v.* CAMPBELL RUSSELL ET AL., INDIVIDUALLY, ETC. Appeal from the District Court of the United States for the Western District of Oklahoma. Submitted October 3, 1923. Decided October 8, 1923. *Per Curiam.* Action below to enjoin utility rates as in violation of the due process clause of the Fourteenth Amendment. Rates sustained as reasonable by State Commission, State Supreme Court, and the United States District Court below. Appellees have filed brief. Appellant has failed to do so. The Court declines, in the absence of a brief, to examine a lengthy record to determine whether the evidence contained therein overcomes the presumption attaching to the finding of the commission and two courts. Decree affirmed. *Mr. George F. Short* and *Mr. C. A. Galbraith* for appellees. No brief filed for appellant.

No. 50. A. BOURJOIS & COMPANY, INC. *v.* GEORGE W. ALDRIDGE, COLLECTOR OF THE PORT OF NEW YORK, ET AL.

On a certificate from the Circuit Court of Appeals for the Second Circuit. Argued October 5, 1923. Decided October 8, 1923. *Per Curiam.* The two questions certified by the Circuit Court of Appeals for Second Circuit are answered in the affirmative, upon the authority of *Bourjois & Co.* v. *Katzel,* 260 U. S. 689, the defendant not objecting. *Mr. Hans v. Briesen* for A. Bourjois & Co., Inc. *Mr. Solicitor General Beck* and *Mr. Harry E. Knight,* Special Assistant to the Attorney General, for Aldridge, submitted..

No. 404. October Term, 1922. THOMAS D. MCCARTHY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, *v.* JULES W. ARNDSTEIN. Appeal from the District Court of the United States for the Southern District of New York. October 15, 1923. The petition for a rehearing in this case is granted; and the case assigned for reargument on Monday, November 19 next, after the cases heretofore assigned for that day. *Mr. Solicitor General Beck, Mr. Lindley M. Garrison, Mr. Saul S. Myers* and *Mr. Walter H. Pollak,* for appellant, in support of the petition. *Mr. W. Randolph Montgomery,* by leave of Court, filed a brief as *amicus curiae.* [See 262 U. S. 355.]

No. 55. HECTOR H. ELWELL *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. Submitted October 5, 1923. Decided October 15, 1923. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. Roy D. Keehn* for appellant. *Mr. Charles C. Case* was also on the brief. *Mr. Solicitor General Beck, Mr. Assistant Attorney Gen-*

eral Riter and *Mr. LeRoy L. Hight,* Special Assistant to the Attorney General, for appellees. *Mr. R. S. Collins* was also on the brief.

No. 61. ANNIE VIOLA DOUGLAS *v.* J. W. RHODES. Appeal from the District Court of the United States for the Eastern District of Arkansas. Argued October 10, 1923. Decided October 15, 1923. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. Patrick H. Loughran* for appellant. *Mr. J. A. Tellier,* with whom *Mr. Zal Harrison, Mr. T. W. Davis, Mr. S. C. Costen, Mr. Joe Rhodes, Jr.,* and *Mr. D. F. Taylor* were on the brief, for appellee.

No. 69. CHICAGO COLD STORAGE WAREHOUSE COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. Argued October 12, 1923. Decided October 15, 1923. *Per Curiam.* Affirmed upon the authority of *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592; *United States* v. *North American Transportation Co.,* 253 U. S. 330, 333. *Mr. Charles T. Tittmann* and *Mr. Peter B. Nelson,* with whom *Mr. Reeves T. Strickland* and *Mr. Donald Defrees* were on the briefs, for appellant. *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

No. 202. HARRIET C. BRITTIN *v.* S. E. JUDEN, PRESIDING JUSTICE, ET AL. Appeal from the District Court of the United States for the Eastern District of Missouri. Submitted, pursuant to the 32d Rule, October 15, 1923.

Decided October 22, 1923. *Per Curiam.* Decree affirmed with costs, upon the authority of *Colvin* v. *Jacksonville,* 158 U. S. 456, 459–460; *El Paso Water Co.* v. *El Paso,* 152 U. S. 157, 159. *Mr. Patrick H. Cullen* and *Mr. T. T. Fauntleroy* for appellant. *Mr. Arthur L. Oliver* and *Mr. Edward D. Hays* for appellees.

No. 80. MATT WALSER *v.* CITY OF SIOUX FALLS. Error to the Municipal Court of the City of Sioux Falls, State of South Dakota. Submitted October 15, 1923. Decided October 22, 1923. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of: (1) *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 314; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.,* 228 U. S. 596, 600; *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 24; (2) *Chapin* v. *Fye,* 179 U. S. 127, 130; *Hunter* v. *Pittsburgh,* 207 U. S. 161, 176; *Booth* v. *Indiana,* 237 U. S. 391, 394; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369; (3) *Vigliotti* v. *Pennsylvania,* 258 U. S. 403, 408. *Mr. Joe Kirby* for plaintiff in error. *Mr. Joe H. Kirby* and *Mr. Thos. H. Kirby* were also on the brief. *Mr. R. W. Parliman* and *Mr. W. G. Porter* for defendant in error. *Mr. R. W. Parliman, Jr.,* was also on the brief.

No. 286. AETNA INSURANCE COMPANY ET AL. *v.* STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC. Error to the Supreme Court of the State of Mississippi. November 12, 1923. *Per Curiam.* Petition for rehearing denied. The authorities under which this case was dismissed were not § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5-6, as stated in the per curiam of October 8, 1923, but were: *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S.

580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195. *Mr. William H. Watkins, Mr. R. L. McLaurin, Mr. William Thompson, Mr. Edward L. Blodgett* and *Mr. Foye M. Murphy,* for plaintiffs in error. *Mr. Earl N. Floyd* for defendant in error. [See *ante,* 673; *infra,* 698.]

No. 157. HARRY KELLMAN *v.* CITY OF ST. LOUIS. Error to the Supreme Court of the State of Missouri. Motion to dismiss submitted October 22, 1923. Decided November 12, 1923. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Bailiff* v. *Tipping,* 2 Cranch, 406; *Brown* v. *Union Bank,* 4 How. 465, 466; *Hogan* v. *Ross,* 9 How. 602, 603; *Insurance Co.* v. *Mordecai,* 21 How. 195, 201; *Kitchen* v. *Randolph,* 93 U. S. 86, 87; *United States* v. *Phillips,* 121 U. S. 254. *Mr. George F. Haid,* for defendant in error, in support of the motion. *Mr. Wm. L. Bohnenkamp* and *Mr. George Eigel* appeared for plaintiff in error.

No. —, Original. *Ex parte:* IN THE MATTER OF L. SANTIAGO CARMONA ET AL., PETITIONERS. Submitted November 12, 1923. Decided November 19, 1923. Motion for leave to file petition for a writ of mandamus herein denied. *Mr. F. Granville Munson* and *Mr. Grant T. Trent* for petitioners.

No. 545. STATE OF OHIO EX REL. GEORGE S. HAWKE *v.* ROBERT A. LEBLOND, AS PRESIDING JUDGE, ETC. Error to the Supreme Court of the State of Ohio. November 19, 1923. *Per Curiam.* The motion to advance is denied. The application for certiorari is also denied, and the writ of error is dismissed by the Court of its own motion, upon authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr*

George S. Hawke for plaintiff in error. *Mr. Robert A. LeBlond* for defendant in error.

No. 314. UNITED STATES *v.* ROGER B. WOOD, TRUSTEE IN BANKRUPTCY, ETC. Appeal from the Circuit Court of Appeals for the Second Circuit. Motion to dismiss or affirm submitted October 22, 1923. Decided November 19, 1923. *Per Curiam.* Judgment affirmed, upon the authority of *United States Shipping Board Emergency Fleet Corp.* v. *Wood,* 258 U. S. 549, 570, 574; *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.,* 224 U. S. 152. *Mr. Godfrey Goldmark,* for defendant in error, in support of the motion. *Mr. Solicitor General Beck* and *Mr. Henry M. Ward,* for the United States, in opposition to the motion.

No. 105. CITY OF WINFIELD *v.* COURT OF INDUSTRIAL RELATIONS ET AL. Error to the Supreme Court of the State of Kansas. Argued November 13, 1923. Decided November 19, 1923. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of *Trenton* v. *New Jersey,* 262 U. S. 182; *Newark* v. *New Jersey,* 262 U. S. 192; *Sapulpa* v. *Oklahoma Natural Gas Co.,* 258 U. S. 608; *Edgewood* v. *Wilkinsburg & East Pittsburgh Street Ry. Co.,* 258 U. S. 604; *Avon* v. *Detroit United Railway,* 257 U. S. 618; *Chicago* v. *Chicago Railways Co.,* 257 U. S. 617; *Groesbeck* v. *Detroit United Railway,* 257 U. S. 609; *Hillsboro* v. *Public Service Commission of Oregon,* point (3), 255 U. S. 562; *Kansas City* v. *Public Service Commission of Missouri,* 250 U. S. 652; *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394; *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178. *Mr. Alfred M. Jackson,* with whom *Mr. Charles B. Smith, Mr. Jesse E. Torrence* and *Mr. Schuyler C. Bloss* were on the brief, for plaintiff in error. *Mr. Fred S. Jackson* and *Mr. H. O. Caster* appeared for defendants in error.

No. 15, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. Submitted November 19, 1923. Decided November 26, 1923. Motion for leave to file petition in intervention of Charles West in this cause denied. *Mr. Cordenio A. Severance* and *Mr. Edward P. Keech, Jr.*, for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Riter* and *Mr. W. W. Dyar*, Special Assistant to the Attorney General, for the United States.

No. 607. STANDARD OIL COMPANY OF NEW JERSEY *v.* SOUTHERN PACIFIC COMPANY. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. November 26, 1923. Motions (1) that the order of this Court on November 12, 1923, granting a petition for a writ of certiorari be restricted to the respondents Southern Pacific Co. and Director General of Railroads, and be vacated as to the personal injury, cargo, and passenger claimants against whom no error is assigned in the petition; and/or (2) that the transcript of record be diminished by at least 500 pages so as to include only evidence bearing directly or indirectly on the errors of law assigned in the petition and brief for certiorari, submitted by *Mr. D. Roger Englar, Mr. T. Catesby Jones,* and *Mr. James W. Ryan,* counsel for Roberts, Carter & Co. and other cargo claimants, and by *Mr. Henry O. Falk* and *Mr. Lawrence B. Cohen,* counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants, and motions granted.

No. 104. JOHN MAYNARD HARLAN *v.* JAMES S. HARLAN. Appeal from the Court of Appeals of the District of Columbia. Argued November 26, 27, 1923. Decided December 3, 1923. *Per Curiam.* This case has become moot because of the institution of the second suit in the Supreme

Court of the District of Columbia, and the passing of the property involved to the receiver in that suit with the consent of the plaintiff in this. The cause is therefore remanded to the Court of Appeals with directions to modify its previous decree and enter an order remanding the cause to the Supreme Court of the District directing it to dismiss the case as moot, awarding no costs to either party. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475; *Board of Public Utility Commissioners* v. *Compañia General*, 249 U. S. 425, 426–7; *Heitmuller* v. *Stokes*, 256 U. S. 359, 362; *Atherton Mills* v. *Johnston*, 259 U. S. 13, 15–16. *Mr. Henry E. Davis* for appellant. *Mr. Henry S. Robbins* for appellee.

No. 62. UNITED STATES *v.* CALIFORNIA MIDWAY OIL COMPANY ET AL. Appeal from the Circuit Court of Appeals for the Ninth Circuit. Argued December 3, 1923. Decided December 10, 1923. *Per Curiam.* Affirmed upon the authority of *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Baker* v. *Schofield*, 243 U. S. 114, 118; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571, 574; *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 13. *Mr. H. L. Underwood*, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States. *Mr. Geo. E. Whitaker* and *Mr. U. T. Clotfelter*, for appellees, submitted.

No. 172. WILLIAM LEATHER ET AL. *v.* MARK J. WHITE. Appeal from the Circuit Court of Appeals for the Seventh Circuit. Argued December 10, 1923. Decided December 10, 1923. Decree reversed with costs; and cause remanded to the District Court of the United States for the Northern District of Illinois for further proceedings. *Mr. Oliver J. Cook*, with whom *Mr. George W. Wilbur* was on

the brief, for appellants. *Mr. Assistant Attorney General Ottinger,* with whom *Mr. Solicitor General Beck* was on the brief, for appellee. [See *post,* 687.]

Nos. 341 and 342. B. I. SALINGER, Jr. *v.* VICTOR LOISEL, U. S. MARSHAL, ETC. Appeal from the District Court of the United States for the Eastern District of Louisiana. Order entered December 10, 1923. On consideration of the petition this day filed herein by the above named appellant, and after hearing counsel for the appellant and counsel for the appellees at the bar, It is ordered that the record and proceedings in that certain cause now depending in the United States Circuit Court of Appeals for the Fifth Circuit, numbered 4088, wherein B. I. Salinger, Jr., is appellant and The United States of America and Victor Loisel, as United States Marshal, are appellees, be certified to this Court for its consideration, review, and determination; It is further ordered that all further proceedings by the said Circuit Court of Appeals in said cause, other than the announcement and delivery of an opinion by such court in such cause, are hereby stayed; And it is further ordered that the said appellant, B. I. Salinger, Jr., be admitted to bail pending the consideration and disposal of said cause by this Court, upon condition that he give a bond in the penal sum of ten thousand dollars, with surety to be approved by the Clerk of this Court, and conditioned for his appearance and surrender pursuant to the ultimate order of this Court in such cause, and for his obedience to that order and to any intervening order in the cause which this Court may make; And it is further ordered that the bond so given shall be in addition to and independent of any other bond or bonds which the said B. I. Salinger, Jr., may have given in other proceedings, and that the rights and remedies of the United States on the bond given here-

under shall be in addition to the rights and remedies which the United States may have on any other bond given by the said Salinger. *Mr. St. Clair Adams, Mr. Benj. I. Salinger* and *Mr. H. L. Salinger* for appellant. *Mr. Solicitor General Beck* and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, for appellee.

No. 223. GROVER E. CLEMMINGS *v.* UNITED STATES. Error to the District Court of the United States for the District of Minnesota. Motion to transfer submitted December 10, 1923. Decided January 7, 1924. *Per Curiam.* Cause transferred to the Circuit Court of Appeals for the Eighth Circuit, upon authority of Act of September 14, 1922, c. 305, 42 Stat. 827; *Heitler v. United States,* 260 U. S. 438, 439. *Mr. Ernest Lundeen* for plaintiff in error. *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Crim* for the United States.

No. 203. ANGEL FIGUEROA *v.* UNITED STATES. On petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss submitted December 10, 1923. Decided January 7, 1924. Motion to dismiss petition for a writ of certiorari herein under Rule 37 granted; and petition dismissed. *Mr. Solicitor General Beck,* for the United States, in support of the motion. *Mr. C. B. Hudspeth* and *Mr. Leander A. Dale* for petitioner.

No. 256. E. E. GOODNO *v.* SOUTH FLORIDA FARMS COMPANY. Error to the Supreme Court of the State of Florida. Motion to dismiss submitted December 3, 1923. Decided January 7, 1924. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana,* 226

U. S. 99, 101; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418, 419; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 255; *Bruce* v. *Tobin*, 245 U. S. 18, 19. *Mr. Daniel Thew Wright, Mr. W. Russell Osborne* and *Mr. Philip Ershler*, for defendant in error, in support of the motion. *Mr. Benjamin Micou*, for plaintiff in error, in opposition to the motion.

No. —, Original. *Ex parte:* IN THE MATTER OF KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL., PETITIONERS. Submitted January 2, 1924. Decided January 7, 1924. Motion for leave to file petition for a writ of mandamus and/or a writ of prohibition herein denied. *Mr. Thomas P. Littlepage* for petitioners.

No. 364. G. S. SWANSON ET AL. *v.* JACK SARJA. Error to the Supreme Court of the State of Minnesota. Motion to dismiss or affirm submitted January 2, 1924. Decided January 7, 1924. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131, 134; *New York Central R. R. Co.* v. *New York*, 186 U. S. 269, 273; *Thomas* v. *Iowa*, 209 U. S. 258, 263; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 326, 331. *Mr. D. F. Lyons*, for defendant in error, in support of the motion. *Mr. George Francis Williams, Mr. Henry C. Clark, Mr. G. S. Swanson* and *Mr. H. G. Swanson*, for plaintiffs in error, in opposition to the motion.

No. 127. ANTHONY MOLINARI *v.* STATE OF MARYLAND; and

No. 480. PETER WEISENGOFF *v.* STATE OF MARYLAND. Error to the Court of Appeals of the State of Maryland. Argued January 2, 1924. Decided January 7, 1924. *Per*

Curiam. Affirmed with costs upon the authority of: (1) *Vigliotti* v. *Pennsylvania,* 258 U. S. 403; (2) *Forsyth* v. *Hammond,* 166 U. S. 506, 518; *Commissioners* v. *Bancroft,* 203 U. S. 112, 118-119; *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362. *Mr. Clarence Lippel,* with whom *Mr. Arch A. Young* and *Mr. Carl G. Mullin* were on the brief, for plaintiff in error in No. 127. *Mr. Saul Praeger,* with whom *Mr. Joseph N. Ulman* and *Mr. G. Tyler Smith* were on the brief, for plaintiff in error in No. 480. *Mr. Alexander Armstrong* and *Mr. Lindsay C. Spencer* appeared for defendant in error.

No. 129. Times Square Auto Supply Company, Inc. *v.* Kansas City, Missouri, et al. Appeal from the District Court of the United States for the Western District of Missouri. Argued January 2, 1924. Decided January 7, 1924. *Per Curiam.* Reversed with costs; and remanded with directions to dismiss for lack of jurisdiction, in that the bill of complaint did not show that the amount involved was in excess of $3,000. Section 24, Judicial Code, paragraph "First"; *Vance* v. *Vandercook Co., No. 2,* 170 U. S. 468, 472; *El Paso Water Co.* v. *El Paso,* 152 U. S. 157, 159; *Colvin* v. *Jacksonville,* 158 U. S. 456, 459-460. *Mr. Arthur Miller* and *Mr. Maurice H. Winger,* for appellant, submitted. *Mr. Samuel J. McCulloch* was also on the brief. *Mr. John B. Pew* and *Mr. Egbert F. Halstead,* with whom *Mr. Ilus M. Lee* was on the brief, for appellees.

No. 118. James C. Davis, as Agent, etc. *v.* E. M. Matthews, Administrator, etc. Certiorari to the Supreme Court of the State of South Carolina. Argued December 4, 5, 1923. Decided January 7, 1924: *Per Curiam.* Affirmed with costs upon the authority of: (1) *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S. 668, 673; *Central Ver-*

mont Ry. Co. v. *White*, 238 U. S. 507, 509; (2) *Illinois Central R. R. Co.* v. *Skaggs*, 240 U. S. 66, 70; *Spokane & Inland Empire R. R. Co.* v. *Campbell*, 241 U. S. 497, 509; (3) *Southern Ry. Co.* v. *Bennett*, 233 U. S. 80, 86; *Louisville & Nashville R. R. Co.* v. *Holloway*, 246 U. S. 525, 529. *Mr. F. L. Willcox* and *Mr. Thomas W. Davis*, with whom *Mr. Henry E. Davis* was on the brief, for petitioner. *Mr. R. E. Whiting*, with whom *Mr. D. Gordon Baker* and *Mr. Felix E. Alley* were on the brief, for respondent.

No. 172. WILLIAM LEATHER ET AL. *v.* MARK J. WHITE. Appeal from the Circuit Court of Appeals for the Seventh Circuit. Argued December 10, 1923. Decided January 7, 1924. *Per Curiam.* Decree reversed with costs; and cause remanded to the said Circuit Court of Appeals for further proceedings on the merits in consideration of the decree of the District Court of the United States for the Northern District of Illinois dated and entered July 7, 1921. *Mr. Oliver J. Cook*, with whom *Mr. George W. Wilbur* was on the brief, for appellants. *Mr. Assistant Attorney General Ottinger*, with whom *Mr. Solicitor General Beck* was on the brief, for appellee. [See *ante*, 682.]

No. 558. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL. *v.* GWENDEN SHAFFER, BY HER GUARDIAN, ETC. Error to the Supreme Court of the State of Missouri. Motion to dismiss or affirm submitted January 7, 1924. Decided January 14, 1924. *Per Curiam.* Affirmed upon the authority of *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36, 52–53; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576–577; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357–358; *New York Central*

R. R. Co. v. *White,* 243 U. S. 188, 208. *Mr. Platt Hubbell,* for defendant in error, in support of the motion. *Mr. John E. Dolman, Mr. M. L. Bell, Mr. W. F. Dickinson, Mr. Bruce Scott, Mr. H. J. Nelson* and *Mr. J. G. Trimble,* for plaintiffs in error, in opposition to the motion.

No. 711. City of New York *v.* James McEntee et al. Error to the Supreme Court of the State of New York. Argued January 8, 9, 1924. Decided January 14, 1924. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Hunter* v. *Pittsburgh,* 207 U. S. 161, 178; *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394; *Trenton* v. *New Jersey,* 262 U. S. 182; *Newark* v. *New Jersey,* 262 U. S. 192, 196. *Mr. George P. Nicholson* and *Mr. John F. O'Brien,* for plaintiff in error, submitted. *Mr. E. Clarence Aiken,* with whom *Mr. Carl Sherman* was on the brief, for defendants in error.

No. 144. Francis Wrenn *v.* State of Iowa. Error to the Supreme Court of the State of Iowa. Submitted January 4, 1924. Decided January 14, 1924. *Per Curiam.* Affirmed. *State* v. *Wrenn,* 194 Iowa, 552, 557; *Hatch* v. *Reardon,* 204 U. S. 152, 160; *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 289. *Mr. T. M. Zink* for plaintiff in error. *Mr. Bruce J. Flick* for defendant in error. *Mr. Ben J. Gibson* was also on the brief.

No. 153. Jose E. Benedicto, as Treasurer of Porto Rico, *v.* Porto Rican American Tobacco Company of Porto Rico. Appeal from the District Court of the United States for Porto Rico. Argued January 11, 1924. Decided January 14, 1924. *Per Curiam.* Reversed with

the direction to dismiss upon the authority of: (1) *Irwin* v. *Wright,* 258 U. S. 219, 222; *Gorham Mfg. Co.* v. *Wendell,* 261 U. S. 1, 5; (2) *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 475; *Board of Public Utility Commissioners* v. *Compañia General,* 249 U. S. 425, 426–427; *Brownlow* v. *Schwartz,* 261 U. S. 216, 217–218. *Mr. Grant T. Trent,* with whom *Mr. F. Granville Munson* was on the brief, for appellant. *Mr. H. Lewis Brown,* with whom *Mr. Branch P. Kerfoot* and *Mr. A. H. Burroughs* were on the brief, for appellee.

No. —, Original. Ex parte: IN THE MATTER OF CLARENCE H. VENNER, PETITIONER. Submitted January 14, 1924. Decided January 21, 1924. Motion for leave to file a petition for a writ of mandamus herein denied. *Mr. Elijah N. Zoline* for petitioner. *Mr. J. P. Blair, Mr. Wm. F. Herrin* and *Mr. Garret W. McEnerney* for respondent.

No. 258. JOSEPH RINI ET AL. *v.* STATE OF LOUISIANA. Error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirm submitted January 14, 1924. Decided January 21, 1924. *Per Curiam.* Dismissed for lack of a federal question. *Spencer* v. *Duplan Silk Co.,* 191 U. S. 526, 530; *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. *Mr. A. V. Coco* and *Mr. Paul A. Sompayrac,* for defendant in error, in support of the motion. *Mr. A. D. Henriques* and *Mr. George J. Gullota,* for plaintiffs in error, in opposition to the motion.

No. 177. UNITED STATES *v.* E. W. GRAY ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Argued January 18, 1924. Decided January 21, 1924.

Per Curiam. Dismissed for lack of jurisdictional amount required by § 241, Judicial Code. *Mr. S. W. Williams,* Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States. *Mr. C. W. King,* with whom *Mr. George F. Short* was on the brief, for appellees.

No. 171. JOAB H. BANTON, DISTRICT ATTORNEY, ETC. *v.* EDWARD M. FULLER ET AL. Appeal from the District Court of the United States for the Southern District of New York. Submitted January 14, 1924. Decided January 21, 1924. *Per Curiam.* Judgment reversed with costs; and cause remanded to the said District Court to be dealt with in the legal discretion of the court. *Dier* v. *Banton,* 262 U. S. 147, 151; *Ex parte Fuller,* 262 U. S. 91. *Mr. John Caldwell Myers* for appellant. *Mr. Arthur Garfield Hays* appeared for appellees.

No. 147. JOAB H. BANTON, DISTRICT ATTORNEY, ETC. *v.* SAMUEL RUSKAY ET AL., ETC. Appeal from the District Court of the United States for the Southern District of New York. Submitted January 16, 1924. Decided January 21, 1924. *Per Curiam.* Decree reversed; and cause remanded to the said District Court to be dealt with in the legal discretion of the court. *Dier* v. *Banton,* 262 U. S. 147, 151; *Ex parte Fuller,* 262 U. S. 91. *Mr. John Caldwell Myers* for appellant. *Mr. Harry J. Gerrity* for appellees.

No. 173. UNITED STATES EX REL. NELIDA A. DURNFORD *v.* HUBERT WORK, SECRETARY OF THE INTERIOR. Error to the Court of Appeals of the District of Columbia. Argued January 17, 1924. Decided January 21, 1924. *Per Curiam.* Judgment affirmed upon the authority of

Riverside Oil Co. v. *Hitchcock,* 190 U. S. 316; *Ness* v. *Fisher,* 223 U. S. 683; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549; *Hall* v. *Payne,* 254 U. S. 343; *Brown* v. *Hitchcock,* 173 U. S. 473, 479. *Mr. Samuel Herrick,* with whom *Mr. P. W. Spaulding* was on the brief, for plaintiff in error. *Mr. H. L. Underwood,* Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for defendant in error.

No. 178. UNITED STATES *v.* J. P. RANSOM. Error to the Circuit Court of Appeals for the Eighth Circuit. Argued January 18, 1924. Decided January 21, 1924. *Per Curiam.* Judgment affirmed upon the authority of *McCurdy* v. *United States,* 246 U. S. 263, 273. *Mr. S. W. Williams,* Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States. *Mr. C. W. King,* with whom *Mr. George F. Short* was on the brief, for defendant in error.

PETITIONS FOR CERTIORARI GRANTED, FROM OCTOBER 1, 1923, TO AND INCLUDING JANUARY 28, 1924.

No. 357. UNITED STATES *v.* EDWARD H. CHILDS, TRUSTEE IN BANKRUPTCY, ETC. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck* for petitioner. *Mr. Moses Cohen* for respondent.

No. 365. B. FERNANDEZ & BROS., SUCCESSORS, *v.* LEONOR AYLLON Y OJEDA, ETC. October 8, 1923. Petitions for a writ of certiorari to the Circuit Court of Appeals for the

First Circuit granted. *Mr. Philip N. Jones, Mr. Frank Antonsanti* and *Mr. Frederick S. Tyler* for petitioner. No brief filed for respondent.

No. 371. JAMES C. DAVIS, AGENT, *v.* MRS. MARY KENNEDY, ADMINISTRATRIX, ETC. October 8, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee granted. *Mr. Fitzgerald Hall* and *Mr. Frank Slemons* for petitioner. *Mr. F. M. Bass* and *Mr. W. E. Norvell, Jr.,* for respondent.

No. 392. ROBERT E. TOD, COMMISSIONER OF IMMIGRATION, *v.* SZEJUA WALDMAN ET AL. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for petitioner. No brief filed for respondents.

No. 401. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY *v.* FORMICA INSULATION COMPANY. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Drury W. Cooper* and *Mr. John C. Kerr* for petitioner. *Mr. John H. Lee* and *Mr. J. Edgar Bull* for respondent.

No. 415. UNITED STATES *v.* JAMES J. JOHNSTON. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States. *Mr. Thomas C. Bradley* for respondent.

No. 423. BALTIMORE & OHIO RAILROAD COMPANY *v.* FREDA GROEGER, ADMINISTRATRIX, ETC. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. S. H. Tolles* for petitioner. *Mr. Frank M. Cobb* for respondent.

No. 450. A. L. MAY, AS TRUSTEE IN BANKRUPTCY, ETC. *v.* J. M. HENDERSON, JR., ET AL. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Henry G. W. Dinkelspiel* for petitioner. No brief filed for respondents.

No. 451. ZIANG SUNG WAN *v.* UNITED STATES. October 15, 1923. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. James A. O'Shea, Mr. Charles Fahy, Mr. Frederic D. McKenney* and *Mr. William C. Dennis* for petitioner. No brief filed for the United States.

No. 455. CHARLES V. DUFFY, COLLECTOR OF INTERNAL REVENUE, ETC. *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for petitioner. *Mr. Charles E. Miller* for respondent.

No. 373. HARRY GLASSMAN *v.* ROBERT C. RAND, RECEIVER, ETC. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Dorothy Frooks* for petitioner. *Mr. Archibald Palmer* for respondent.

No. 512. EDMUND L. EBERT ET AL. *v.* HARRY P. POSTON. October 22, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Michigan granted. *Mr. P. J. M. Hally* for petitioners. *Mr. Louis Cohane* for respondent.

No. 517. E. I. DUPONT DE NEMOURS & COMPANY *v.* JAMES C. DAVIS, DIRECTOR GENERAL, ETC. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Z. B. Harrison* for petitioner. *Mr. Luther M. Walter*, by leave of Court, as *amicus curiae*. No appearance for respondent.

No. 546. WILLIAM R. RODMAN, UNITED STATES MARSHAL, *v.* ROLAND R. POTHIER. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Solicitor General Beck* for petitioner. *Mr. Davis G. Arnold* for respondent.

No. 547. MISSOURI PACIFIC RAILROAD COMPANY *v.* ROY STROUD. October 22, 1923. Petition for a writ of certiorari to the Springfield Court of Appeals of the State of Missouri granted. *Mr. Edward J. White, Mr. James F. Green* and *Mr. J. C. Sheppard* for petitioner. No appearance for respondent.

No. 549. STANDARD OIL COMPANY OF NEW JERSEY, AS OWNER, ETC., OF THE STEAMSHIP LLAMA *v.* UNITED STATES. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit. *Mr. Cletus Keating* and *Mr. John M. Woolsey* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. J. Frank Staley*, Special Assistant to the Attorney General, for the United States.

No. 559. UNITED STATES *v.* NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, ETC. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Solicitor General Beck* for petitioner. *Mr. John G. White* and *Mr. Austin V. Cannon* for respondent.

No. 573. FULLERTON-KRUEGER LUMBER COMPANY *v.* NORTHERN PACIFIC RAILWAY COMPANY ET AL. October 22, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Mr. John Junell* for petitioner. No appearance for respondents.

No. 574. A. J. OLIVER, TRUSTEE IN BANKRUPTCY, ETC. *v.* UNITED STATES ET AL. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Louis V. Crowley* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for respondents.

No. 581. C. O. LINDER *v.* UNITED STATES. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. George Turner* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for the United States.

No. 582. EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE, ETC. *v.* FIDELITY TRUST COMPANY. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assis-

tant Attorney General, for petitioner. *Mr. H. Gordon McCouch* for respondent.

No. 590. GEORGE R. MEEK *v.* CENTRE COUNTY BANKING COMPANY ET AL.;

No. 591. FLORENCE F. DALE *v.* CENTRE COUNTY BANKING COMPANY ET AL., ETC.; and

No. 592. ANDREW BREEZE *v.* CENTRE COUNTY BANKING COMPANY ET AL. October 22, 1923. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Mortimer C. Rhone* and *Mr. Harry Keller* for petitioners. *Mr. Newton B. Spangler* and *Mr. Samuel D. Gittig* for respondents.

No. 376. STATE OF MISSOURI EX REL. ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY *v.* WILSON A. TAYLOR, JUDGE, ETC. Error to the Supreme Court of the State of Missouri. November 12, 1923. Petition for a writ of certiorari herein granted. *Mr. Edward J. White, Mr. James F. Green* and *Mr. M. W. Hayden,* for plaintiff in error, in support of the petition. No brief filed for defendant in error.

No. 586. ISOM GRAYSON ET AL. *v.* JAMES A. HARRIS ET AL. Error to the Supreme Court of the State of Oklahoma. November 12, 1923. Petition for a writ of certiorari herein granted. *Mr. Robert M. Rainey* and *Mr. Streeter B. Flynn,* for plaintiffs in error, in support of the petition. *Mr. Robert F. Blair* and *Mr. George S. Ramsey,* for defendants in error, in opposition to the petition.

No. 607. STANDARD OIL COMPANY OF NEW JERSEY *v.* SOUTHERN PACIFIC COMPANY ET AL. November 12, 1923.

Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. W. H. McGrann* and *Mr. John M. Woolsey* for petitioner. *Mr. D. Roger Englar, Mr. T. Catesby Jones* and *Mr. Charles C. Burlingham* for respondents.

No. 609. AUSTIN NICHOLS & COMPANY *v.* STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., ET AL.;

No. 610. EUG. SANCHEZ ET AL., TRADING AS E. SANCHEZ & COMPANY, *v.* STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., ET AL.; and

No. 611. E. TOLIBIA & COMPANY *v.* STEAMSHIP ISLA DE PANAY, HER ENGINES, ETC., ET AL. November 12, 1923. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. T. Catesby Jones* and *Mr. James W. Ryan* for petitioners. *Mr. John W. Crandall* for respondents.

No. 346. JOHN D. FLANAGAN *v.* FEDERAL COAL COMPANY. November 19, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee granted. *Mr. James J. Lynch* for petitioner. No brief filed for respondent.

No. 528. WILLIAM M. BARRETT, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY *v.* ARTHUR H. VAN PELT. November 19, 1923. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Charles W. Stockton* for petitioner. *Mr. Lamar Hardy* and *Mr. Louis C. White* for respondent.

No. 594. C. V. BROWNE *v.* UNION PACIFIC RAILROAD COMPANY. November 26, 1923. Petition for a writ of

certiorari to the Supreme Court of the State of Kansas granted. *Mr. Ray Campbell* for petitioner. *Mr. N. H. Loomis* and *Mr. T. M. Lillard* for respondent.

No. 623. COMMONWEALTH OF AUSTRALIA ET AL. *v.* JOHN L. MCLEAN, AS TRUSTEE IN BANKRUPTCY, ETC. December 10, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Corwin S. Shank* for petitioners. *Mr. Ira Bronson* and *Mr. H. B. Jones* for respondent.

No. 495. JAMES C. DAVIS, AS DIRECTOR GENERAL, ETC. *v.* A. E. MANRY. January 7, 1924. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia granted. *Mr. T. M. Cunningham, Jr.*, and *Mr. I. J. Hofmayer* for petitioner. *Mr. Robert Douglas Feagin* for respondent.

No. 708. SAM MICHAELSON ET AL. *v.* UNITED STATES EX REL. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY. January 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Donald R. Richberg, Mr. John A. Cadigan* and *Mr. Jackson H. Ralston* for petitioners. *Mr. Richard L. Kennedy* for respondent.

PETITIONS FOR CERTIORARI DENIED, FROM OCTOBER 1, 1923, TO AND INCLUDING JANUARY 28, 1924.

No. 286. AETNA INSURANCE COMPANY ET AL. *v.* STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC. Error to the Supreme Court of the State of Mississippi. October

8, 1923. Petition for a writ of certiorari herein denied. *Mr. William H. Watkins, Mr. R. L. McLaurin, Mr. William Thompson, Mr. Edward L. Blodgett* and *Mr. Foye M. Murphy,* for plaintiffs in error, in support of the petition. *Mr. Earl N. Floyd,* for defendant in error, in opposition to the petition. [See *ante,* 673, 678.]

No. 347. JAMES C. DAVIS, DIRECTOR GENERAL, ETC. *v.* STANDARD OIL COMPANY OF INDIANA. October 8, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Herbert E. Boynton* for petitioner. *Mr. Reuben Hatch* for respondent.

No. 348. PENNSYLVANIA RAILROAD COMPANY *v.* NETTIE A. CROUSE, ADMINISTRATRIX, ETC. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Union C. DeFord* for petitioner. No appearance for respondent.

No. 356. W. MEISCHKKE-SMITH ET AL., TRUSTEES, ETC. *v.* JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE, ETC., ET AL. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Allan P. Matthew* and *Mr. Edward J. McCutchen* for petitioners. No brief filed for respondents.

No. 360. UNITED STATES TO THE USE AND BENEFIT OF W. B. YOUNG SUPPLY COMPANY *v.* CHARLES O. STEWART ET AL. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. I. N. Watson* and *Mr. Henry N. Ess* for petitioner. No appearance for respondents.

No. 362. CHARLES H. ADDINGTON, AS TRUSTEE IN BANKRUPTCY, ETC. *v.* FORSYTH METAL GOODS COMPANY. October 8, 1923. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. John A. Van Arsdale* for petitioner. *Mr. Harold J. Adams* for respondent.

No. 363. SUMNER IRON WORKS *v.* TODD DRYDOCK & CONSTRUCTION CORPORATION. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. E. Horan* for petitioner. *Mr. Solicitor General Beck, Mr. Chauncey G. Parker* and *Mr. Henry M. Ward* for respondent.

No. 378. RAY E. ROBINSON ET AL. *v.* UNITED STATES. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin Slade* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 379. JAMES COX DAVIS, AGENT, ETC. *v.* MARION C. SLOCOMB, ADMINISTRATRIX, ETC. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. F. G. Dorety* and *Mr. Edwin C. Matthias* for petitioner. *Mr. Arthur E. Griffin* for respondent.

No. 380. PAUL P. GLASER *v.* UNITED STATES. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank P. Walsh* and *Mr. Paul P. Glaser* for petitioner. No brief filed for the United States.

No. 382. JULIUS CONRAD ET AL. *v.* THE MAZATLAN, AND THE OWNER THEREOF, ETC. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James Donovan* for petitioners. *Mr. Edward J. McCutchen, Mr. Farnham P. Griffiths* and *Mr. Robert M. Clarke* for respondents.

No. 386. INDIAN TERRITORY ILLUMINATING OIL COMPANY *v.* BARTLESVILLE ZINC COMPANY ET AL. Appeal from the Circuit Court of Appeals for the Third Circuit. October 8, 1923. Petition for a writ of certiorari herein denied. *Mr. Watson B. Robinson, Mr. William J. Hughes* and *Mr. Charles A. Frueauff,* for appellant, in support of the petition. *Mr. Joseph B. Cotton,* for appellees, in opposition to the petition. [See *ante,* 673.]

No. 410. NE-GON-AH-E-QUAINCE, OR MRS. C. C. CLARK, ET AL. *v.* OTTO H. HORN. October 8, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Webster Ballinger* and *Mr. Frank D. Beaulieu* for petitioners. *Mr. John L. Erdall* for respondent.

No. 413. BUHL INDEPENDENT SCHOOL DISTRICT No. 3, IN TWIN FALLS COUNTY, IDAHO, *v.* NEIGHBORS OF WOODCRAFT. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Fremont Wood* for petitioner. *Mr. James H. Richards* and *Mr. Oliver O. Haga* for respondent.

No. 414. AMERICAN MILLS COMPANY *v.* GEORGE F. HOFFMAN ET AL., COPARTNERS, ETC. October 8, 1923. Pe-

tition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Uttal* for petitioner. *Mr. John B. Doyle* for respondents.

No. 416. KATHRYN SELLERS, JUDGE JUVENILE COURT, DISTRICT OF COLUMBIA, *v.* WILLIS BROWN. October 8, 1923. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Lewis B. Perkins* and *Miss Kathryn Sellers* for petitioner. No appearance for respondent.

No. 417. NEW ENGLAND OIL CORPORATION *v.* ISLAND OIL MARKETING CORPORATION. October 8, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Harry Covington* and *Mr. Thomas B. Gay* for petitioner. *Mr. Frank J. Hogan, Mr. Frederick T. Kelsey* and *Mr. George Bryan* for respondent.

No. 395. J. L. LANCASTER ET AL., RECEIVERS, ETC. *v.* R. A. SEXTON, ADMINISTRATOR, ETC. October 15, 1923. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied. *Mr. F. H. Prendergast* for petitioners. *Mr. S. P. Jones* for respondent.

No. 422. FRANK F. PELS COMPANY, INC. *v.* SAXONY SPINNING COMPANY. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. J. Parker* for petitioner. *Mr. John M. Robinson* for respondent.

No. 427. UNITED SHOE MACHINERY CORPORATION *v.* LORENZ MUTHER. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Charles F. Choate, Jr.*, and *Mr. Lucius E. Varney* for petitioner. *Mr. Edward F. McClennen* for respondent.

No. 431. ETHEL V. LANSTON *v.* AUBREY LANSTON ET AL. October 15, 1923. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. T. M. Wampler* for petitioner. No appearance for respondents.

No. 435. CONTINENTAL INSURANCE COMPANY ET AL. *v.* MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Nathan H. Chase, Mr. M. H. Boutelle* and *Mr. Lamar Hill* for petitioners. *Mr. Henry S. Mitchell* for respondent.

No. 436. S. M. NIXON ET AL. *v.* UNITED STATES. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. H. Witty* and *Mr. J. H. Petersen* for petitioners. *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Crim* for the United States.

No. 437. AUGUST POPE ET AL. *v.* UNITED STATES. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. B. B. McGinnis* and *Mr. John C. Bane* for petitioners.

Mr. Solicitor General Beck and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 439. JACOB PETRY *v.* COMMONWEALTH OF PENNSYLVANIA. October 15, 1923. Petition for a writ of certiorari to the Superior Court of the State of Pennsylvania denied. *Mr. Lowrie C. Barton* for petitioner. No appearance for respondent.

No. 446. MERRIMACK NATIONAL BANK *v.* HOLLIS R. BAILEY, ET AL., TRUSTEES, ETC. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Philip N. Jones* for petitioner. No appearance for respondents.

No. 448. CLARA F. CHAPIN, EXECUTRIX, ETC. *v.* BARTHOLOMEW A. BRICKLEY, TRUSTEE, ETC.; and

No. 449. CLARA F. CHAPIN, EXECUTRIX, ETC. (IN THE MATTER OF CODMAN, FLETCHER & COMPANY, BANKRUPTS). October 15, 1923. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Hollis R. Bailey* for petitioner. *Mr. Mark M. Horblit* and *Mr. Jacob Wassermann* for respondents.

No. 452. GUILLERMO SEVERINO *v.* FABIOLA SEVERINO ET AL. October 15, 1923. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Quintin Paredes* and *Mr. Felipe Buencamino, Jr.,* for petitioner. *Mr. F. C. Fisher* for respondents.

No. 462. R. L. BENNETT & SONS *v.* FARMERS SEED & GIN COMPANY OF PARIS, INC. October 15, 1923. Peti-

tion for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John M. Spellman* for petitioner. *Mr. Tom L. Beauchamp* for respondent.

No. 465. INTERNATIONAL RADIO TELEGRAPH COMPANY *v.* ATLANTIC COMMUNICATION COMPANY;

No. 466. INTERNATIONAL RADIO TELEGRAPH COMPANY *v.* ATLANTIC COMMUNICATION COMPANY; and

No. 502. MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA *v.* ATLANTIC COMMUNICATION COMPANY. October 15, 1923. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick W. Winter* and *Mr. Drury W. Cooper* for petitioner in Nos. 465 and 466. *Mr. John W. Griggs* and *Mr. James R. Sheffield* for petitioner in No. 502. *Mr. George C. Fraser* for respondent.

No. 470. JUVENILE SHOE COMPANY, INC. *v.* FEDERAL TRADE COMMISSION. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Paul Overton* for petitioner. *Mr. Solicitor General Beck, Mr. W. H. Fuller* and *Mr. Chas. M. Neff* for respondent.

No. 474. EVA HAND, ADMINISTRATRIX, ETC. *v.* JAMES C. DAVIS, AGENT, ETC. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Warren Switzler* for petitioner. No appearance for respondent.

No. 481. UNION CENTRAL LIFE INSURANCE COMPANY *v.* ISAAC M. RODEN ET AL. October 15, 1923. Petition for

a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert Ramsey* for petitioner. *Mr. Ganson Taggart* for respondents.

No. 483. AMERICAN PAPER PRODUCTS COMPANY OF INDIANA *v.* LAGERLOEFF TRADING COMPANY, INC. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward E. Gates* for petitioner. *Mr. H. S. Hornbrook* for respondent.

No. 491. HENRY FISCHER *v.* WABASH RAILWAY COMPANY ET AL. October 15, 1923. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Jerome E. Malino* for petitioner. *Mr. Winslow S. Pierce, Mr. Lawrence Greer* and *Mr. William S. Jenney* for respondents.

No. 496. JACK MAYS *v.* UNITED STATES. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Randolph Harrison* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 499. MITSUBISHI SHOJI KAISHA, LIMITED, *v.* JAMES C. DAVIS, DIRECTOR GENERAL, ETC. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph Larocque* for petitioner. *Mr. Theodore Kiendl* for respondent.

No. 501. DAMPSKIBS SELSK DANNEBROG *v.* J. ARON & COMPANY, INC., ET AL. October 15, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roscoe H. Hupper* for petitioner. *Mr. Horace L. Cheyney* for respondents.

No. 418. FOX TYPEWRITER COMPANY *v.* UNDERWOOD TYPEWRITER COMPANY. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Fred L. Chappell* for petitioner. *Mr. Hans v. Briesen* for respondent.

No. 492. WILLIAM S. BREWER *v.* UNITED STATES. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Brewer* pro se. *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Crim* for the United States.

No. 505. WALTER L. ROSS, RECEIVER, ETC. *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of St. Clair County, Illinois, denied. *Mr. C. E. Pope* and *Mr. Walter A. Eversman* for petitioner. No appearance for respondents.

No. 506. J. B. SIMPSON *v.* UNITED STATES. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John J. Sullivan* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 510. Sue Phillips Gates *v.* Maryland Casualty Company. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Dallas V. Halverstadt* for petitioner. *Mr. William C. Prentiss* and *Mr. Walter L. Clark* for respondent.

No. 513. Wenbourne-Karpen Dryer Company *v.* Cutler Dry Kiln Company et al. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William R. Rummler* and *Mr. Joseph B. Cotton* for petitioner. *Mr. Drury W. Cooper* for respondents.

No. 514. Territory of Alaska *v.* Annette Island Packing Company et al. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James Wickersham* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Ottinger* and *Mr. Harvey B. Cox* for respondents.

No. 515. Henry L. Bogart et al. *v.* Southern Pacific Company. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Spotswood B. Bowers* and *Mr. Dudley F. Phelps* for petitioners. *Mr. Arthur H. Van Brunt* and *Mr. Gordon M. Buck* for respondent.

No. 516. Henry L. Bogart et al. *v.* Southern Pacific Company. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sec-

ond Circuit denied. *Mr. Dudley F. Phelps* for petitioners. *Mr. Arthur H. Van Brunt* and *Mr. Gordon M. Buck* for respondent.

No. 523. JOSEPH F. DIERICKX *v.* JAMES C. DAVIS, FEDERAL AGENT, ETC. October 22, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Indiana denied. *Mr. David K. Tone* for petitioner. *Mr. Silas H. Strawn, Mr. J. Walter Dohany, Mr. John D. Black, Mr. John A. Gavit* and *Mr. Frank E. Robson* for respondent

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No. 525. COMMERCIAL ELECTRICAL SUPPLY COMPANY *v.* W. L. CURTIS, RECEIVER, ETC., ET AL. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James B. McDonough* and *Mr. M. C. Early* for petitioner. *Mr. Thomas B. Pryor* and *Mr. Vincent M. Miles* for respondents.

No. 527. NICODEMUS B. HURR ET AL. *v.* EVERETT W. DAVIS ET AL. October 22, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Robert C. Bell* for petitioners. No appearance for respondents.

No. 535. AMERICAN CHAIN COMPANY *v.* INTERSTATE IRON & STEEL COMPANY. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James M. Beck* and *Mr. Victor Elting* for petitioner. *Mr. Jacob Newman* and *Mr. Edward R. Johnston* for respondent.

No. 536. MOUNT VERNON CAR MANUFACTURING COMPANY v. PRESSED STEEL MANUFACTURING COMPANY ET AL. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry Love Clarke* for petitioner. *Mr. George T. Buckingham* and *Mr. George L. Wilkinson* for respondents.

No. 537. O. H. CHRISP *v.* JAMES C. DAVIS, DIRECTOR GENERAL, ETC. Error to the Supreme Court of the State of Arkansas. October 22, 1923. Petition for a writ of certiorari herein denied. *Mr. Leslie C. Garnett,* for plaintiff in error, in support of the petition. No brief filed for defendant in error.

No. 538. WILLIAM JORING ET AL. *v.* WILLIAM LESLIE HARRISS ET AL. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George B. Hayes* for petitioners. *Mr Martin W. Littleton, Mr. Charles E. Hughes, Jr.,* and *Mr. Otis B. Kent* for respondents.

No. 541. MARIE DOVE WILLIAMSON *v.* SEABOARD AIR LINE RAILWAY COMPANY. October 22, 1923. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. Edward P. Buford* for petitioner. No appearance for respondent.

No. 543. FRANK TRUEBA *v.* UNITED STATES. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert Ash* for petitioner. *Mr. Solicitor General Beck* and *Mr. Assistant Attorney General Crim* for the United States.

No. 548. ASUNCION MITCHEL *v.* MANILA RAILROAD COMPANY. October 22, 1923. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Alexander Britton, Mr. F. W. Clements* and *Mr. L. H. Cake* for petitioner. No appearance for respondent.

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550. FAIR OAKS STEAMSHIP CORPORATION, CLAIMANT OF STEAMSHIP WEST IRMO, *v.* UNITED STATES SHIPPING BOARD ET AL. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John W. Griffin* for petitioner. *Mr. Solicitor General Beck, Mr. Chauncey G. Parker* and *Mr. Oscar A. Stumpe* for respondents.

No. 557. SANFORD COAL COMPANY *v.* WISCONSIN BRIDGE & IRON COMPANY. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Bruce A. Campbell, Mr. Edward C. Kramer* and *Mr. Rudolph J. Kramer* for petitioner. *Mr. Silas H. Strawn, Mr. John D. Black* and *Mr. Arthur W. Fairchild* for respondent.

No. 563. PORTO RICO FERTILIZER COMPANY *v.* PEDRO GANDIA. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis G. Caffey* for petitioner. *Mr. José A, Poventud* for respondent.

No. 564. SEBASTIAN BRIDGE DISTRICT *v.* MISSOURI PACIFIC RAILROAD COMPANY. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Ap-

peals for the Eighth Circuit denied. *Mr. James B. McDonough* for petitioner. *Mr. Edward J. White* and *Mr. Thomas B. Pryor* for respondent.

No. 566. ADAM KLUCHINSKY ET AL., ETC. *v.* JOHN ZERNOSKY, ETC. October 22, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Roscoe R. Koch* for petitioners. *Mr. Daniel C. Donoghue* and *Mr. M. J. Ryan* for respondent.

No. 567. ALGIONAL H. RAE, CLAIMANT OF 1,250 CASES OF INTOXICATING LIQUORS, *v.* UNITED STATES;

No. 568. CHARLES EUGENE ALBURY, CLAIMANT OF THE SCHOONER HENRY L. MARSHALL, *v.* UNITED STATES; and

No. 569. CHARLES EUGENE ALBURY, CLAIMANT OF THE SCHOONER HENRY L. MARSHALL, *v.* UNITED STATES. October 22, 1923. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas B. Felder, Mr. Pierre M. Brown* and *Mr. Horace L. Cheyney* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 577. PACIFIC AMERICAN FISHERIES *v.* EMIL HOOF. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Evan S. McCord* and *Mr. Stephen V. Carey* for petitioner. No appearance for respondent.

No. 578. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY *v.* SPENCER, KELLOGG & SONS, INC. October 22, 1923. Petition for a writ of certiorari to the

Supreme Court of the State of New York denied. *Mr. William S. Jenney* for petitioner. *Mr. Frank Gibbons* for respondent.

No. 579. EDWARD A. RUMELY ET AL. *v.* UNITED STATES. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter C. Noyes, Mr. William L. Wemple, Mr. Arthur G. Hays* and *Mr. Henry B. Johnson* for petitioners. *Mr. Solicitor General Beck* and *Mr. LeRoy L. Hight* for the United States.

No. 584. IRVING BANK-COLUMBIA TRUST COMPANY *v.* NEW YORK RAILWAYS COMPANY ET AL. October 22, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward Cornell, Mr. Frank D. Pavey, Mr. Martin A. Schenck* and *Mr. William J. Hughes* for petitioner. *Mr. Edwin S. S. Sunderland* and *Mr. Mansfield Ferry* for respondents.

No. 438. BESTWALL MANUFACTURING COMPANY *v.* UNITED STATES GYPSUM COMPANY. November 12, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Laurence A. Janney* for petitioner. *Mr. W. Clyde Jones* for respondent.

No. 554. COWOKOCHEE *v.* JAMES A. CHAPMAN ET Error to the Supreme Court of the State of Oklahoma. November 12, 1923. Petition for a writ of certiorari herein denied. *Mr. Lewis C. Lawson,* for plaintiff in error, in support of the petition. No appearance for defendants in error.

No. 545. STATE OF OHIO EX REL. GEORGE S. HAWKE *v.* ROBERT A. LEBLOND, AS PRESIDING JUDGE, ETC. [See *ante*, 679.]

No. 576. DENISON-PRATT PAPER COMPANY *v.* NEWS PUBLISHING COMPANY. November 19, 1923. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. Charles D. Merrick* and *Mr. Buford C. Tynes* for petitioner. *Mr. C. M. Hanna* for respondent.

No. 598. BARNEY McCOURTNEY ET AL. *v.* UNITED STATES. November 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John M. Cleary* for petitioners. No brief filed for the United States.

No. 617. DOVAN CHEMICAL CORPORATION *v.* NATIONAL ANILINE & CHEMICAL COMPANY. November 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James R. Sheffield* and *Mr. Drury W. Cooper* for petitioner. *Mr. Charles H. Otis* for respondent.

No. 620. THEODORE DEWITT *v.* UNITED STATES. November 19, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Ben B. Wickham* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 619. OLIVER OIL GAS BURNER & MACHINE COMPANY *v.* INTERNATIONAL HEATING COMPANY ET AL. No-

vember 26, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wilbur B. Jones, Mr. S. W. Fordyce* and *Mr. Thomas W. White* for petitioner. *Mr. Frederick W. Lehmann* for respondents.

No. 599. JOSEPH G. HEINTZ *v.* UNITED STATES;

No. 600. MAX SMITHBERGER *v.* UNITED STATES;

No. 601. JOLIET CITIZENS' BREWING COMPANY *v.* UNITED STATES; and

No. 602. OSCAR WEINBROD *v.* UNITED STATES. December 3, 1923. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank J. Jones* and *Mr. Thos. F. Donovan* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 650. KWOCK SEU LUM *v.* EDWARD WHITE, AS COMMISSIONER OF IMMIGRATION, ETC. December 3, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. M. Walton Hendry* for petitioner. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for respondent.

No. 654. ILLINOIS FUEL COMPANY *v.* WALTER G. SPACE, DOING BUSINESS UNDER THE NAME AND STYLE OF SPACE COAL COMPANY. December 3, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel W. Baxter, Mr. Henry G. Miller* and *Mr. David E. Keefe* for petitioner. *Mr. John L. Flannigen* for respondent.

No. 661. CHRISTINE WALTERS *v.* JOHN BARTON PAYNE, AGENT. December 3, 1923. Petition for a writ of cer-

tiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Clarence Balentine* for petitioner. No appearance for respondent.

No. 390. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* EVA CHINN ET AL. December 10, 1923. Petition for a writ of certiorari to the Appellate Court of the State of Indiana denied. *Mr. O. W. Dynes* and *Mr. H. H. Field* for petitioner. No appearance for respondents.

No. 629. ROBERT BERRYMAN *v.* UNITED STATES;

No. 630. JAKE TUCKERMAN *v.* UNITED STATES;

No. 631. JOE ROBILIO ET AL. *v.* UNITED STATES; and

No. 632. LOFTIS WILKES ET AL. *v.* UNITED STATES. December 10, 1923. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles M. Bryan* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 649. WABASH RAILWAY COMPANY *v.* SAMUEL T. HOFF. December 10, 1923. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Homer Hall* and *Mr. N. S. Brown* for petitioner. *Mr. Clay C. Rogers* and *Mr. Cyrus Crane* for respondent.

No. 664. E. J. FINNERAN *v.* WILLIAM J. BURTON, TRUSTEE, ETC. December 10, 1923. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles Ray Dean* and *Mr. Luther Ely Smith* for petitioner. *Mr. Forrest C. Donnell* for respondent.

No. 595. FATA SALKOVICH, BY KOSTO UNKOVICH, ATTORNEY IN FACT, *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA. December 10, 1923. Petition for a writ of certiorari to the Supreme Court of the State of California denied for failure to file the same within the time prescribed by the statute. *Mr. William M. Williams* for petitioner. *Mr. Warren H. Pillsbury* for respondent.

No. 500. SOUTHERN EXPRESS COMPANY v. PARKE-CRAMER COMPANY. January 7, 1924. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. John M. Robinson* for petitioner. *Mr. Hamilton C. Jones* for respondent.

Nos. 638 and 639. GEORGE REMUS ET AL. *v.* UNITED STATES. January 7, 1924. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Elijah N. Zoline* for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States. *Mr. T. T. Ansberry*, by leave of Court, as *amicus curiae*.

No. 653. AUSTIN WESTERN ROAD MACHINERY COMPANY *v.* DISC GRADER & PLOW COMPANY. January 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William B. Kerkman* and *Mr. Dwight B. Cheever* for petitioner. *Mr. Amasa C. Paul* for respondent.

No. 659. LAWRENCE F. CONNOLLY, ADMINISTRATOR, ETC., ET AL. *v.* ROBERT H. ELDER, ADMINISTRATOR, ETC., ET AL. January 7, 1924. Petition for a writ of certiorari

to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles W. Beale* for petitioners. No appearance for respondents.

No. 634. BOARD OF DIRECTORS OF MILLER LEVEE DISTRICT No. 2 *v.* PRAIRIE PIPE LINE COMPANY. Appeal from the Circuit Court of Appeals for the Eighth Circuit. January 7, 1924. Petition for a writ of certiorari herein denied. *Mr. Henry Moore, Jr.*, for appellants, in support of the petition. *Mr. W. H. Arnold* for appellee.

No. 655. UNITED STATES EX REL. PIONEER CONSTRUCTION COMPANY *v.* MADISON COUNTY, ARKANSAS, ET AL. January 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Claude Duty* for petitioner. No appearance for respondents.

No. 670. OPALITE SIGN COMPANY ET AL. *v.* FLEXLUME SIGN COMPANY, INC. January 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Russell Wiles, Mr. George A. Chritton* and *Mr. William H. Dyrenforth* for petitioners. *Mr. Edward Rector, Mr. William Nevarre Cromwell* and *Mr. Comfort S. Butler* for respondent.

No. 671. PERKINS GLUE COMPANY *v.* GOULD MANUFACTURING COMPANY ET AL.; and

No. 672. PERKINS GLUE COMPANY *v.* WISCONSIN CHAIR COMPANY ET AL. January 7, 1924. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas Ewing* and *Mr. Gorham Crosby* for petitioner. *Mr. James A. Watson* for respondents.

Nos. 673, 674, and 675. WILEN W. EASTERDAY, ETC. *v.* UNITED STATES. January 7, 1924. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Harry S. Barger* for petitioner. No brief filed for the United States.

No. 694. LOFTIS WILKES *v.* UNITED STATES. January 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles M. Bryan* for petitioner. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt,* Assistant Attorney General, for the United States.

No. 696. PRIMOS CHEMICAL COMPANY *v.* GOLDSCHMIDT THERMIT COMPANY. January 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George W. Wickersham* and *Mr. Paul Synnestvedt* for petitioner. *Mr. Livingston Gifford* for respondent.

No. 700. KNIGHTS OF THE KU KLUX KLAN, INC. *v.* INTERNATIONAL MAGAZINE COMPANY. January 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert P. Massey* for petitioner. *Mr. William A. DeFord* for respondent.

No. 710. BROOKLYN HEIGHTS RAILROAD COMPANY *v.* GOLDE PLOXIN, ADMINISTRATRIX, ETC. January 7, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John L. Wells* for petitioner. *Mr. Thomas J. O'Niell* for respondent.

No. 534. WALTER DAVIS *v.* JOHN BARTON PAYNE, AGENT, ETC. January 14, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Oregon denied. *Mr. William M. Cake* and *Mr. Will R. King* for petitioner. No appearance for respondent.

No. 701. LEILA A. CAWTHON, ADMINISTRATRIX, ETC. *v.* FRED W. FEHR. January 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Murray Seasongood* for petitioner. *Mr. Sidney G. Stricker* for respondent.

No. 715. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* J. FRED DRAYTON. Error to the Circuit Court of Appeals for the Eighth Circuit. January 14, 1924. Petition for a writ of certiorari herein denied. *Mr. Alexander Britton* and *Mr. Gardiner Lathrop,* for plaintiff in error, in support of the petition. No appearance for defendant in error.

No. 726. SEABOARD AIR LINE RAILWAY COMPANY *v.* O. T. BELSHE. Error to the Supreme Court of the State of North Carolina. January 14, 1924. Petition for a writ of certiorari herein denied. *Mr. Murray Allen,* for plaintiff in error, in support of the petition. *Mr. Clyde A. Douglass, Mr. William C. Douglass* and *Mr. Robert N. Simms,* for defendant in error, in opposition to the petition.

No. 727. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY *v.* V. C. PICKERING, ADMINISTRATOR, ETC. January 14, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Mr. Sam P. Maddox for petitioner. *Mr. John D. Little, Mr. Arthur Gray Powell, Mr. Marion Smith* and *Mr. Max F. Goldstein* for respondent.

No. 613. HANS HEIDNER ET AL. *v.* ST. PAUL & TACOMA LUMBER COMPANY. January 21, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Guy E. Kelley* for petitioners. *Mr. J. T. S. Lyle* for respondent.

No. 706. DRUSILLA CARR ET AL. *v.* CHARLES H. STEBBINS ET AL. January 21, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. E. G. Ballard, Mr. Henry Warrum, Mr. Edward W. Felt* and *Mr. Frank P. Walsh* for petitioners. No appearance for respondents.

No. 712. JOHN C. WALTON *v.* STATE OF OKLAHOMA BY THE BOARD OF MANAGERS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF OKLAHOMA ET AL. January 21, 1924. Petition for a writ of certiorari to the Court of Impeachment of the State of Oklahoma denied. *Mr. Finis E. Riddle* and *Mr. Henry B. Martin* for petitioner. *Mr. George F. Short* and *Mr. J. D. Lydick* for respondents.

No. 741. HENRY F. MUELLER ET AL. *v.* SAMUEL W. ADLER ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. January 21, 1924. Petition for a writ of certiorari herein denied. *Mr. Ephrim Caplan* and *Mr. William J. Hughes,* for appellants, in support of the petition. No appearance for appellees.

No. 682. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. *v.* ALASKA PACKERS ASSOCIATION. January 28, 1924. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. Warren H. Pillsbury* for petitioners. No appearance for respondent.

No. 681. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. *v.* ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY LIMITED. January 28, 1924. Petition for a writ of certiorari to the Supreme Court of the State of California denied. *Mr. Warren H. Pillsbury* for petitioners. *Mr. Hampton Hoge* for respondent.

No. 713. WESTMORELAND BREWING COMPANY, INC., ET AL. *v.* UNITED STATES. January 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. B. B. McGinnis* and *Mr. John Duggan, Jr.*, for petitioners. *Mr. Solicitor General Beck* and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, for the United States.

No. 719. M. M. HOPKINS, TRUSTEE, ETC. *v.* EQUITABLE TRUST COMPANY OF NEW YORK. January 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederick T. Saussy* for petitioner. *Mr. Max Isaac* for respondent.

No. 720. MATTHEW M. HOPKINS, TRUSTEE, ETC. *v.* NATIONAL SHAWMUT BANK OF BOSTON ET AL. January 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frederick T. Saussy* for petitioner. *Mr. William L. Clay* for respondents.

No. 723. PYRENE MANUFACTURING COMPANY *v.* HARRISON H. BOYCE ET AL. January 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. F. P. Warfield* for petitioner. *Mr. Charles Neave, Mr. Joseph H. Milans* and *Mr. Edmund Quincy Moses* for respondents.

No. 724. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* JAMES B. FRYE. January 28, 1924. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Thomas D. O'Brien, Mr. Thomas P. Littlepage, Mr. Alexander E. Horn* and *Mr. Edward S. Stringer* for petitioner. *Mr. Frederick M. Miner* for respondent.

No. 725. JAY A. HEIDBRINK ET AL. *v.* ELMER I. MCKESSON. January 28, 1924. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. F. A. Whiteley* for petitioners. *Mr. George E. Kirk* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 1, 1923, TO AND INCLUDING JANUARY 28, 1924.

No. 2. HILLSBORO COAL COMPANY ET AL. *v.* EDWARD C. KNOTTS, UNITED STATES DISTRICT ATTORNEY, ETC., ET AL. Appeal from the District Court of the United States for the Southern District of Illinois. October 1, 1923. Dismissed, without costs to either party, per stipulation, on motion of *Mr. Solicitor General Beck* in that behalf. *Mr. Stephen A. Foster, Mr. Rush C. Butler* and *Mr. James M. Graham* for appellants.

No. 3. HERMAN C. PERRY ET AL. *v.* EDWARD C. KNOTTS, UNITED STATES DISTRICT ATTORNEY, ETC., ET AL. Appeal from the District Court of the United States for the Southern District of Illinois. October 1, 1923. Dismissed, without costs to either party, per stipulation, on motion of *Mr. Solicitor General Beck* in that behalf. *Mr. Nathan G. Moore, Mr. William P. Sidney* and *Mr. William D. Bangs* for appellants.

No. —, Original. R. LEE MAKELY, TRADING AS MAKELY MOTOR COMPANY, *v.* VICTOR P. GAUTHEY ET AL. October 1, 1923. Motion for leave to file original action in assumpsit herein, dismissed, without prejudice, on motion of *Mr. Lloyd T. Everett* for plaintiff.

No. 8. JAMES C. DAVIS, DIRECTOR GENERAL, ETC. *v.* J. J. SMITH, JR., ADMINISTRATOR, ETC. Error to the Supreme Court of the State of Mississippi. October 1, 1923. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. H. O'B. Cooper* for plaintiff in error. *Mr. Marion W. Reily* for defendant in error.

No. 13. LOS ANGELES GAS & ELECTRIC CORPORATION *v.* DEPARTMENT OF PUBLIC SERVICE OF THE CITY OF LOS ANGELES ET AL. Error to the District Court of Appeal, First Appellate District, Division 1, of the State of California. October 1, 1923. Dismissed with costs, per stipulation. *Mr. Paul Overton* and *Mr. Samuel Poorman, Jr.*, for plaintiff in error. No appearance for defendants in error.

No. 302. MISSOURI PACIFIC RAILROAD COMPANY *v.* DOROTHY PUGH. Error to the Supreme Court of the State

of Arkansas. October 1, 1923. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. E. B. Kinsworthy* and *Mr. Robert E. Wiley* for plaintiff in error. No appearance for defendant in error.

No. 302. MISSOURI PACIFIC RAILROAD COMPANY *v.* DOROTHY PUGH. Error to the Supreme Court of the State of Arkansas. October 1, 1923. Petition for a writ of certiorari herein dismissed, on motion of counsel for plaintiff in error and petitioner. *Mr. E. B. Kinsworthy* and *Mr. Robert E. Wiley* for plaintiff in error and petitioner. No appearance for defendant in error and respondent.

No. 406 AMERICAN RAILWAY EXPRESS COMPANY *v.* SANTA ANNA GAS COMPANY. On petition for a writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. October 1, 1923. Petition dismissed, on motion of counsel for petitioner. *Mr. Frank L. Snodgrass* and *Mr. Prescott Gatley* for petitioner. No appearance for respondent.

No. 191. JOHN A. GROGAN, COLLECTOR OF INTERNAL REVENUE, ETC. *v.* BRYANT WALKER, EXECUTOR, ETC. Error to the District Court of the United States for the Eastern District of Michigan. October 5, 1923. Dismissed with costs, on motion of *Mr. Solicitor General Beck* for plaintiff in error. *Mr. H. E. Spalding* for defendant in error.

No. 430. JOHN A. DAVIS ET AL. *v.* G. G. WARDE ET AL. Error to the Supreme Court of the State of Georgia. October 5, 1923. Dismissed with costs, per stipulation. *Mr. John D. Little, Mr. Arthur G. Powell, Mr. Marion*

Smith, Mr. Max F. Goldstein, Mr. Sam S. Bennett, Mr. J. Robert Pottle and *Mr. Issaac J. Hofmayer* for plaintiffs in error. No appearance for defendants in error.

No. 433. JULES SCHNERB ET AL. *v.* HOLT MANUFACTURING COMPANY. On petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October 8, 1923. Dismissed, per stipulation. *Mr. William H. Page* for petitioners. No appearance for respondent.

No. 63. CHARLES D. NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL. *v.* NEWTOWN GAS COMPANY. Appeal from the District Court of the United States for the Southern District of New York. October 8, 1923. Dismissed, per stipulation. *Mr. John J. O'Brien* and *Mr. Harry Hertzoff* for appellants. No appearance for appellee.

No. 88. UNITED STATES *v.* NATIONAL CITY BANK OF NEW YORK. Error to the Circuit Court of Appeals for the Second Circuit. October 15, 1923. Dismissed, on motion of *Mr. Solicitor General Beck* for the United States. No appearance for defendant in error.

No. 96. SOUTHEASTERN EXPRESS COMPANY *v.* STOKES V. ROBERTSON, STATE REVENUE AGENT, ETC., ET AL. Appeal from the District Court of the United States for the Southern District of Mississippi. October 16, 1923. Dismissed with costs, without prejudice to the right of the appellant to prosecute its appeal in case (between same parties) now pending in this Court, being No. 216, October Term, 1923, on motion of counsel for appellant. *Mr. Sanders McDaniel, Mr. A. S. Bozeman* and *Mr. H. L. Greene* for appellant. No appearance for appellees.

No. 614. HOMER I. STEPHENSON *v.* FRANK KRATKE, WARDEN OF THE COMMON JAIL OF THE CITY AND COUNTY OF DENVER. Appeal from the District Court of the United States for the District of Colorado. October 22, 1923. Docketed and dismissed with costs, on motion of *Mr. Blackburn Esterline* for appellee. No appearance for appellant.

No. 644. UNITED STATES *v.* PRINCE LINE, LTD. Error to the District Court of the United States for the Eastern District of New York. November 12, 1923. Docketed and dismissed, on motion of *Mr. Cletus Keating* for defendant in error. *Mr. Solicitor General Beck* for the United States.

No. 645. UNITED STATES *v.* AMERICAN HAWAIIAN STEAMSHIP COMPANY. Error to the District Court of the United States for the Eastern District of New York. November 12, 1923. Docketed and dismissed on motion of *Mr. Cletus Keating* for defendant in error. *Mr. Solicitor General Beck* for the United States.

No. 196. HARRY RYAN ET AL. *v.* UNITED STATES. On petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. November 12, 1923. Dismissed, on motion of counsel for petitioners. *Mr. Charles E. Riordan* for petitioners. *The Attorney General* for the United States.

No. 234. VENANCIO CONCEPCION *v.* PEOPLE OF THE PHILIPPINE ISLANDS. On petition for a writ of certiorari to the Supreme Court of the Philippine Islands. November 12, 1923. Dismissed, on motion of counsel for petitioner. *Mr. A. C. Carson* for petitioner. No appearance for respondent.

No. 287. SAMUEL GREENBERG ET AL. *v.* UNITED STATES. On petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. November 12, 1923. Dismissed, on motion of counsel for petitioners. *Mr. John H. Bruninga* for petitioners. *The Attorney General* for the United States.

No. 372. C. E. GAINES *v.* STATE OF TEXAS. On petition for a writ of certiorari to the Court of Criminal Appeals of the State of Texas. November 12, 1923. Dismissed, per stipulation. *Mr. W. W. Nelms* for petitioner. *Mr. W. A. Keeling* for respondent.

No. 12, Original. *Ex parte:* IN THE MATTER OF MICHAEL QUINN, PETITIONER. Petition for a writ of mandamus. November 19, 1923. Petition dismissed, on motion of counsel for petitioner. *Mr. William C. Prentiss* for petitioner.

No. 387. MICHAEL HEITLER *v.* UNITED STATES;

No. 388. NATHANIEL PERLMAN *v.* UNITED STATES; and

No. 389. MANDEL GREENBERG *v.* UNITED STATES. On petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. November 26, 1923. Petitions dismissed, on motion of counsel for petitioners. *Mr. Weymouth Kirkland* for petitioners. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Crim* and *Mr. Harry S. Ridgely* for the United States.

No. 246. LUCY TOM, NÉE BIGPOND, ET AL. *v.* C. C. MILLS. Error to the Supreme Court of the State of Oklahoma. January 2, 1924. Dismissed with costs, per stipulation. *Mr. Finis E. Riddle* and *Mr. James J. Mars*

for plaintiffs in error. *Mr. Albert H. Bell* and *Mr. Ray S. Fellows* for defendant in error.

No. 490. LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* SHREVEPORT RAILWAYS COMPANY. Appeal from the District Court of the United States for the Eastern District of Louisiana. January 2, 1924. Dismissed with costs, per stipulation. *Mr. Huey P. Long* for appellants. *Mr. Wm. H. Armbrecht* and *Mr. E. H. Randolph* for appellee.

No. 687. HAMILTON F. KEAN ET AL. *v.* NATIONAL CITY BANK. On petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. January 2, 1924. Dismissed, on motion of counsel for petitioners. *Mr. William H. FitzHugh* for petitioners. No appearance for respondent.

No. 149. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* SAMUEL WECHSLER. On writ of certiorari to the Kansas City Court of Appeals of the State of Missouri. January 7, 1924. Reversed with costs, and cause remanded for further proceedings, per stipulation. *Mr. O. H. Dean, Mr. H. M. Langworthy* and *Mr. Roy B. Thomson* for petitioner. *Mr. William S. Hogsett, Mr. Murat Boyle* and *Mr. Mont T. Prewitt* for respondent.

No. 669. HON. EDWARD E. CUSHMAN, UNITED STATES DISTRICT JUDGE, ETC. *v.* PACIFIC TELEPHONE & TELEGRAPH COMPANY. On petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. January 7, 1924. Petition dismissed, on motion of counsel for petitioner. *Mr. Raymond W. Clifford* and *Mr. Thos. J. L. Kennedy* for petitioner. *Mr. C. M. Bracelen, Mr. Otto*

B. Rupp, Mr. H. D. Pillsbury, Mr. Frank T. Post and *Mr. W. V. Tanner* for respondent.

No. 459. CITY OF JACKSON *v.* LAMAR LIFE INSURANCE COMPANY ET AL.; and

No. 460. CITY OF JACKSON *v.* MISSISSIPPI FIRE INSURANCE COMPANY ET AL. Error to the Supreme Court of the State of Mississippi. January 14, 1924. Dismissed with costs, on motion of *Mr. Garner W. Green* and *Mr. Marcellus Green* for plaintiff in error. *Mr. J. Morgan Stevens* for defendants in error.

No. 210. THOMAS M. BLAKE *v.* UNITED STATES. Appeal from the Court of Claims. January 28, 1924. Dismissed, on motion of counsel for appellant. *Mr. Jennings C. Wise* for appellant. *The Attorney General* for the United States.

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No. 338. FREDERIC SCHUTTE, ADMINISTRATOR, ETC., ET AL. *v.* THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, ET AL. Appeal from the Court of Appeals of the District of Columbia. June 28, 1923. Dismissed pursuant to the 28th Rule. *Mr. John Wilson Brown III* and *Mr. Alfred K. Nippert* for appellants. *The Attorney General* for appellees.

No. 52. MACHINERY & METALS SALES COMPANY, ETC. *v.* UNITED STATES. Appeal from the Court of Claims. July 5, 1923. Dismissed pursuant to the 28th Rule. *Mr. W. E. Humphrey* and *Mr. Wm. C. Prentiss* for appellant. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Lovett* and *Mr. W. W. Dyar* for the United States.

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